93-289
No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

166 pp

QUESTIONS PRESENTED

The Defense Base Closure and Realignment Act of 1990 (Base Closure Act), 10 U.S.C. 2687 note (Supp. IV 1992), establishes a mechanism to identify unneeded domestic military bases for closure and realignment. The questions presented are:

1. Whether the base closure and realignment recommendations of the Secretary of Defense and the Defense Base Closure and Realignment Commission or the President's decision to accept or reject the Commission's recommendations is subject to judicial review under the principles set forth in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992).

2. Whether the Base Closure Act itself "preclude[s] judicial review" of statutory claims for purposes of the Administrative Procedure Act, 5 U.S.C. 701(a)(1).

PARTIES TO THE PROCEEDING

Petitioners herein, who were defendants below, are John H. Dalton, Secretary of the Navy; Les Aspin, Secretary of Defense; The Defense Base Closure and Realignment Commission; and the Commission's members—James A. Courter; Peter B. Bowman; Beverly B. Byron; Rebecca G. Cox; Hansford T. Johnson; Harry C. McPherson, Jr.; and Robert D. Stuart, Jr. All petitioners except James A. Courter and Robert D. Stuart, Jr. are substituted as parties pursuant to Rule 35.3 of this Court.

Respondents in this Court, who were plaintiffs below, are Sen. Arlen Specter; Sen. Harris Wofford; Sen. Bill Bradley; Sen. Frank Lautenberg; Governor Robert P. Casey; Commonwealth of Pennsylvania; Ernest D. Preate, Jr., Pennsylvania Attorney General; Rep. Curt Weldon; Rep. Thomas Foglietta; Rep. Robert Andrews; Rep. R. Lawrence Coughlin; City of Philadelphia; Howard J. Landry; International Federation of Professional and Technical Engineers, Local 3; William F. Reil; Metal Trades Council, Local 687 Machinists; Governor James J. Florio; State of New Jersey; Robert J. Del Tufo, New Jersey Attorney General; Governor Michael N. Castle; State of Delaware; Rep. Peter H. Kostmeyer; Rep. Robert A. Borski; Ronald Warrington; and Planners Estimators Progressman & Schedulers Union Local No. 2.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

JOHN H. DALTON, SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense, the Secretary of the Navy, the Defense Base Closure and Realignment Commission, and the Chairman and members of the Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-25a) is reported at 995 F.2d 404. A prior opinion of the court of appeals (App., *infra*, 26a-82a) is reported at 971 F.2d 936. The opinion of the district court (App., *infra*, 85a-91a) is reported at 777 F. Supp. 1226.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1993. A petition for rehearing was denied on June 14, 1993. App., *infra*, 92a-94a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Defense Base Closure and Realignment Act of 1990 (Base Closure Act or Act), as amended, 10 U.S.C. 2687 note (Supp. IV 1992),[1] and relevant provisions of the Administrative Procedure Act (APA), 5 U.S.C. 701 and 704, are reproduced at App., *infra*, 98a-130a.

STATEMENT

Respondents brought this action seeking to enjoin the closure of the Philadelphia Naval Shipyard under the Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808. C.A. App. 61, 65, 68.[2] A divided panel of the court of appeals concluded that certain of respondents' procedural objections to base-closure recommendations made by the Secretary of Defense to the Defense Base Closure and Realignment Commission—and by the Commission to the President—are subject to judicial review under the APA. App., *infra*, 60a-62a. Subsequently, in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767 (1992), a case involving a similar statutory scheme, this Court held that recommendations of subordinate officials to the President do not

[1] The Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, has been amended in respects not relevant here. See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. 102-190, Tit. III, § 344(b)(1), Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1345, 1544-1546, 1551; National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), Tit. XXVIII, § 2821(b), 106 Stat. 2502, 2607-2608. For simplicity, we refer to sections of the Base Closure Act as codified in 10 U.S.C. 2687 note (Supp. IV 1992).

[2] Respondents are Members of Congress from Pennsylvania and New Jersey; Pennsylvania, New Jersey, and Delaware, and officials thereof; the City of Philadelphia; Philadelphia Naval Shipyard workers; and local unions. See App., *infra*, 28a.

constitute "final agency action" under the APA, 5 U.S.C. 704, and that the APA does not apply to the President's actions. We accordingly petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the court of appeals' decision, and remanded the case for further consideration in light of *Franklin*. App., *infra*, 83a-84a.

On remand, a divided panel of the court of appeals concluded that *Franklin* permits judicial review of procedural claims under the Base Closure Act, reasoning that if the Secretary of Defense and the Commission committed procedural errors, the President acted beyond his constitutional authority in approving the Commission's recommendations. App., *infra*, 9a-12a. In so doing, the panel's decision on remand (1) evades the holding of *Franklin* and broadly subjects the President's actions to judicial review despite the limited scope of the APA; (2) squarely conflicts with the First Circuit's recent decision in *Cohen* v. *Rice*, 992 F.2d 376 (1993); and (3) threatens the integrity and expedition of the carefully designed process that Congress established in the Base Closure Act.

A. Statutory Background

The Defense Base Closure and Realignment Act, Pub. L. No. 101-510, Tit. XXIX, 104 Stat. 1808, established a mechanism for identifying and closing unnecessary domestic military bases. The Act provides for three rounds of base closures,[3] to take place in 1991, 1993, and 1995. § 2903(c)(1). For each round, the Secretary of Defense must submit a six-year "force-structure plan * * * based on an assessment * * * of the probable threats to the

[3] The Base Closure Act also governs so-called "realignments," which include "any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." § 2910(5). For convenience, we use the term "base closures" to refer to both base closures and realignments.

national security" during that period. § 2903(a). The Secretary also must establish, after notice and an opportunity for public comment, selection criteria to be used in making base closure recommendations. § 2903(b). Based on the force-structure plan and selection criteria for each round, the Secretary must prepare base closure recommendations for that round. § 2903(c).

The Act requires the Secretary of Defense, by April 15 in 1991 (and by March 15 in 1993 and 1995), to forward his recommendations to Congress and to the Defense Base Closure and Realignment Commission, an independent commission established under the Act.[4] §§ 2902 (a), 2903(c)(1). The Commission is charged with holding public hearings and then preparing a report containing both an assessment of the Secretary's recommendations and the Commission's own recommendations for base closures. § 2903(d)(1) and (2). The Commission may make changes in the Secretary's recommendations if it determines that the Secretary has "deviated substantially" from the force-structure plan and the selection criteria. § 2903(d)(2)(B) and (C). The Commisison must then forward its report to the President by July 1. § 2903(e).

The President may approve or disapprove the Commission's recommendations, and must transmit his determination to Congress and the Commission by July 15. § 2903 (e)(1)-(3). If the President disapproves the Commission's recommendations, it must prepare new recommendations and resubmit them to the President no later than August 15. § 2903(e)(3). If the President then disapproves the revised recommendations (or takes no action by September 1), no bases may be closed that year under the Act. § 2903(e)(5).

If the President approves the initial or revised recommendations, Congress then reviews the President's decision

[4] The Secretary must make available to the Commission and the Comptroller General (*viz.* the General Accounting Office (GAO)) all the information used in making his recommendations. § 2903 (c)(4).

through the mechanism of considering a joint resolution of disapproval. §§ 2904(b), 2908. If a joint resolution of disapproval is enacted (after presentment to the President for signing), the Secretary of Defense may not close or realign the bases approved by the President. § 2904 (b). If a joint resolution is not enacted within 45 days or by the date Congress adjourns for the session, whichever is earlier,[5] the Secretary is required to close or realign all of the military installations approved by the President for closure or realignment. § 2904(a).

B. The Proceedings In This Case

1. a. On April 15, 1991, the Secretary of Defense transmitted to the Commission a list of domestic military installations for closure or realignment. That list included the Philadelphia Naval Shipyard. 56 Fed. Reg. 15,184 (1991). The Commission held public hearings in Washington, D.C., as well as in Philadelphia and elsewhere around the country, receiving testimony from officials of the Department of Defense, legislators, and expert witnesses. Members of the Commission visited major facilities recommended for closure, including the Philadelphia Shipyard. The Commission's final report recommended the closure or realignment of 82 bases. Those recommendations differed from the Secretary's in several respects, but the Commission concurred in the Secretary's recommendation to close the Philadelphia Shipyard. App., *infra*, 33a.

On July 10, 1991, the President approved the Commission's recommendations. C.A. App. 52. The Armed Services Committees of both Houses of Congress conducted hearings on the recommended closures. App., *infra*, 33a-34a. On July 30, 1991, the House of Representatives entertained a proposed resolution of disapproval. 137 Cong. Rec. H6006-H6039 (daily ed.). During the ensuing

[5] To facilitate the process of legislative consideration, the Act adopts streamlined legislative procedures to eliminate ordinary delays. § 2908.

debate, several of the respondent Members of Congress contended that the proposed resolution should be passed because of alleged flaws in the procedures by which the Philadelphia Shipyard was recommended for closure. See *id.* at H6009-H6010 (Rep. Weldon); *id* at H6010-H6011 (Rep. Foglietta); *id.* at H6021 (Rep. Andrews). The House, however, ultimately rejected the resolution of disapproval by a vote of 364 to 60. *Id.* at H6039; App., *infra,* 34a.

b. On July 8, 1991, respondents filed this action under the APA and the Base Closure Act against the Secretary of the Navy, the Secretary of Defense, the Commission, and the Commission's members, seeking to enjoin the closure of the Shipyard. C.A. App. 7, 61, 65, 68. Respondents claimed, among other things, that the Secretary of Defense and the Commission failed to comply with certain procedural requirements alleged to be imposed by the Base Closure Act. See, *e.g., id.* at 58-59, 67; App., *infra,* 6a-7a n.3 35a, 60a, 62a. Respondents did not name the President as a defendant, nor did they allege that he had violated the Act or otherwise acted unlawfully.

On November 1, 1991, the district court granted the government's motion to dismiss the suit in its entirety. App., *infra,* 85a-91a. The district court concluded that the Base Closure Act itself "preclude[s] judicial review" for purposes of the APA, 5 U.S.C. 701(a)(1). App., *infra,* 85a-88a. It held, in the alternative, that the political question doctrine forecloses review of the base closure decision. *Id.* at 88a-91a.

2. a. A divided panel of the court of appeals affirmed in part and reversed in part. See App., *infra,* 26a-82a.[6]

[6] The court of appeals held that the plaintiff union members and Philadelphia Shipyard employees had standing to challenge the base closure. Because the positions of all the plaintiffs were the same, the court declined to address the standing of the others. App., *infra,* 36a-39a.

As a preliminary matter, the court of appeals considered whether the actions at issue in this case constitute "final agency action" for purposes of the APA, 5 U.S.C. 704. Although respondents were challenging actions or omissions of the Secretary of Defense and the Commission in making their recommendations, the court acknowledged that "at least in one sense, we are being asked to review a presidential decision." App., *infra,* 43a. As the court explained, because the Secretary and the Commission have authority only to make recommendations under the Act, respondents "necessarily seek relief" from the President's decision to approve the Commission's recommendations. *Id.* at 42a. The court of appeals recognized that the APA might not apply to "presidential decisionmaking" because the President might not be an "agency" within the meaning of that Act. *Id.* at 43a. Nevertheless, the court concluded that the APA's judicial review provisions "represent[] a codification of the common law" and that the actions of the President are not, as such, automatically immune from judicial review at common law. *Ibid.*

Turning to other grounds for preclusion of review under the APA, the court of appeals held that the Base Closure Act itself precludes judicial review of some, but not other, claims under the Act. First, the court held that no judicial review of decisions under the Act is available prior to the effective date of the President's decision—*i.e.,* until after expiration of the 45-day period for congressional review under Section 2904(b). The court explained that the Act sets a very stringent timetable and that "the ability of participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention." App., *infra,* 44a-45a.

Second, because Congress imposed "no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources," the court found that the substance of the President's base closure decision "is committed by law to presidential dis-

cretion." App., *infra*, 46a; see 5 U.S.C. 701(a)(2) (no judicial review of actions "committed to agency discretion by law"). Similarly, the court determined that judicial review is unavailable to the extent that it relates to the merits of base closure recommendations prepared by the Secretary and the Commission. App., *infra*, 56a-60a, 61a-62a.

At the same time, the court detected no evidence that Congress intended to preclude judicial review of alleged noncompliance by the Secretary or the Commission with certain of the Act's procedural provisions. App., *infra*, 60a-62a. Specifically, the court found that judicial review would be available for (1) a claim that the Secretary failed to transmit to the Commission and the GAO all of the information that the Secretary used in making his recommendations, and (2) a claim that the Commission did not hold public hearings as required by the Act. *Id.* at 60a, 62a & n.15.

Finally, the court rejected the claims of the union and shipyard employees that the alleged violations of the Base Closure Act violated their rights under the Due Process Clause. The court reasoned that the Act created no property interest in the plaintiffs. App., *infra*, 67a-69a.[7]

b. Judge Alito dissented, concluding that the Base Closure Act precludes judicial review of all statutory claims, procedural and substantive. App., *infra*, 69a-82a. After examining the structure and history of the Act, Judge Alito reasoned that judicial review of individual base closures would undermine the Act's objectives of expedition and finality, and would negate the crucial statutory feature of having all base closures approved or disapproved in a single package. *Id.* at 74a-82a. He also

[7] The court of appeals also reversed the district court's ruling that this lawsuit should be dismissed under the political question doctrine. App., *infra*, 63a-67a.

concluded that the legislative history, which discusses the need to eliminate litigation-related obstacles to base closure, supports preclusion of judicial review. *Id.* at 70a-74a.

3. On June 26, 1992, this Court issued its decision in *Franklin* v. *Massachusetts*, 112 S. Ct. 2767, which, *inter alia*, addressed the existence of "final agency action" in a suit seeking APA review of the decennial reapportionment of the House of Representatives. The Census Act provides that the Secretary of Commerce must submit a census report to the President, who then certifies to Congress the number of Representatives to which each State is entitled under a statutory formula. This Court held that the Secretary's report was not "final agency action" because it served as "a tentative recommendation" and carried "no direct consequences for reapportionment." *Id.* at 2774. Although the President's action had sufficient indicia of finality, the Court held that the President is not an "agency"—and that his certification to the House of Representatives therefore is not "agency action"—for purposes of the APA. *Id.* at 2775.

Because of the similarities between this case and *Franklin*, we petitioned for a writ of certiorari in this case. On November 9, 1992, this Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for further consideration in light of *Franklin*. App., *infra*, 83a-84a.

4. a. On May 18, 1993, a divided panel of the court of appeals held on remand that *Franklin* does not affect the reviewability of respondents' procedural claims. App., *infra*, 1a-25a. The court reasoned that the Court in *Franklin* "declined only to review the President's decision under the APA" and that it "expressly sanctioned" judicial review of the constitutionality of Presidential decisions. App., *infra*, 10a. The majority concluded that if the Secretary and the Commission violated the Base Closure Act's

procedures, the President's subsequent approval of the Commission's recommendations violated the Act as well. *Id.* at 10a-12a. The majority further reasoned that because the President may act only pursuant to constitutional or statutory authority, review of Presidential action for consistency with the "non-discretionary mandates of [an] authorizing statute" was "a form of constitutional review" authorized under *Franklin*. *Ibid.*

b. Judge Alito again dissented. App., *infra*, 19a-25a. He noted that respondents "vigorously contended * * * that *Franklin* does not bar review *under the APA*," and did not argue "that they were entitled to non-APA review based either on common law or separation of powers principles." *Id.* at 20a. Turning to the merits, Judge Alito disagreed with the majority's reasoning that respondents had stated a constitutional claim against the President simply by alleging that the Secretary of Defense and the Commission had failed to comply with all of the Base Closure Act's procedural requirements. *Id.* at 21a-25a.

c. On June 14, 1993, the court of appeals denied petitioners' petition for rehearing and suggestion of rehearing en banc. Judges Hutchinson, Nygaard, and Alito would have granted rehearing en banc. App., *infra*, 92a-94a.

REASONS FOR GRANTING THE PETITION

Because it allows judicial review of alleged procedural errors in the formulation of the Commission's nonbinding recommendations to the President, the court of appeals' decision in this case cannot be reconciled with this Court's decision in *Franklin* v. *Massachusetts*, *supra*. By holding that the President's action is reviewable—for *constitutional* error—whenever his subordinates allegedly commit procedural errors under the statute authorizing the President to act, the court of appeals' decision opens the door to

broad non-APA judicial challenges to Presidential action. The ruling below therefore eviscerates the limits on judicial review recognized by this Court in *Franklin*. It also creates a direct conflict with the First Circuit's recent decision in *Cohen* v. *Rice*, *supra*, which dismissed a virtually identical suit challenging a base closure in Maine and specifically held that *Frankiln* precludes judicial review of all claims under the Base Closure Act.

1. a. The court of appeals' decision in this case squarely conflicts with the principles of judicial review set forth by this Court in *Franklin* v. *Massachusetts*, *supra*. Under the statute at issue in *Franklin*, the Secretary of Commerce prepared a report to the President containing each State's population according to the 1990 census, and the President, in turn, certified to Congress the number of United States Representatives to which each State was entitled under a statutory formula. *Franklin*, 112 S. Ct. at 2771. The plaintiffs claimed, *inter alia*, that the Secretary's method of allocating military service members among the States was arbitrary and capricious under the APA.

This Court held that there was no "final agency action" that may be reviewed under the APA. *Franklin*, 112 S. Ct. at 2773. Turning first to the report prepared by the Secretary of Commerce, the Court explained that the "core question" regarding finality was "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Ibid.* Because the Secretary's report "carrie[d] no direct consequences for the reapportionment," this Court held that it was "more like a tentative recommendation than a final and binding determination." *Id.* at 2774.

By contrast, the President's transmittal of the report to Congress along with his certification of the number of Representatives "settle[d] the apportionment" and was "final" action in the relevant sense. *Franklin*, 112 S. Ct.

at 2775. The Court held, however, that it was not final "agency" action for purposes of the APA. "Out of respect for the separation of powers and the unique constitutional position of the President," the Court held that the APA's "textual silence" concerning its coverage of the President was insufficient "to subject the President to [its] provisions." *Ibid.* Because "the APA does not expressly allow review of the President's actions," the Court "presume[d] that his actions are not subject to its requirements." *Id.* at 2775-2776.

A straightforward application of *Franklin* makes clear that there likewise is no "final agency action" reviewable under the APA in this case. As relevant here, respondents' complaint challenges the validity of the procedures used by the Secretary of Defense and the Commission to prepare their base closure recommendations. Like the Secretary's report in *Franklin*, the base closure report of the Commission is only tentative and has "no direct effect" (*Franklin*, 112 S. Ct. at 2774), until after the President certifies his approval of the report to Congress. See § 2904(a) and (b); pp. 4-5, *supra*. The actions of the Secretary of Defense, which precede those of the Commission in the decision-making process, are even more "tentative." *Franklin*, 112 S. Ct. at 2774. In short, because the challenged actions of the Commission and the Secretary are merely nonbinding and preliminary to the President's final decision, they do not, under *Franklin*, constitute "final agency action" that is subject to judicial review under the APA.[8] See also *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333

[8] If anything, the Secretary's and the Commission's recommendations in this case are more clearly nonfinal than the report of the Secretary of Commerce in *Franklin*. Whereas the President's role in reapportionment is "admittedly ministerial" (*Franklin*, 112 S. Ct. at 2775), the Base Closure Act explicitly contemplates that the President must approve or disapprove the Commission's recommendations, and he may end the process entirely by disapproving the Commission's recommendations. § 2903(e)(3) and (5).

U.S. 103, 113 (1948) (administrative actions "are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as the consummation of the administrative process"). And because the President is not an "agency," his action in approving the Commission's recommendations and certifying that approval to Congress is not subject to judicial review under the APA. *Franklin*, 112 S. Ct. at 2775-2776.

b. Although this Court vacated the court of appeals' prior decision and remanded it for further consideration in light of the principles articulated in *Franklin* (see 113 S. Ct. 455; App., *infra*, 83a-84a), the court of appeals evaded *Franklin*'s holding by recasting respondents' routine statutory claims of procedural error by subordinate officials into constitutional claims of ultra vires action by the President.[9] Relying on this Court's observation in *Franklin* that "the President's actions may * * * be reviewed for constitutionality" (112 S. Ct. at 2776), and citing *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), for the proposition that the President's actions must be rooted in constitutional or statutory authority, the court of appeals in this case held that allegations of defects in the President's subordinates' compliance with the requirements of an authorizing statute automatically raise constitutional questions that are reviewable under *Franklin*. App., *infra*, 10a-12a. That reasoning, however, is inconsistent with *Franklin* and traditional precepts governing judicial review of governmental acts.

[9] In fact, respondents did not purport to challenge the President's actions, on constiutional or other grounds. In their brief on remand, respondents emphasized that "it is the conduct of [the] defendants —not that of the President—that [they] challenge." Resp. C.A. Remand Br. 12 (emphasis omitted). Respondents explained, moreover, that they "do *not* seek review of the merits of any presidential decision or exercise of discretion, nor do they seek any relief from or involving the President, who is not a party." *Id.* at 8.

First, the court of appeals has applied the concept of ultra vires action so broadly that it effectively does away with *Franklin*'s restrictions on judicial review of Presidential action. The court in this case held that respondents stated a constitutional challenge to Presidential action in approving recommendations that allegedly were formulated in a procedurally flawed manner by his subordinates. If such claims of garden-variety statutory error by subordinates are sufficient to trigger "common law" judicial review of the President's actions (App., *infra*, 8a)—notwithstanding *Franklin* and the limited reach of the APA—then few if any challenges to Presidential actions will be unreviewable in practice.

That result would sharply undermine *Franklin*'s concern for "the separation of powers and the unique constitutional position of the President." *Franklin*, 112 S. Ct. 2775. By vesting the ultimate decision concerning base closures in the President (subject to legislative disapproval), Congress assigned responsibility for final action to a uniquely accountable official, and one whose actions are not reviewable under the APA for routine defects. In light of the separation of powers considerations articulated in *Franklin* and other decisions of this Court (cf. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 747-753 (1982); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 811 n.17 (1982)), the court of appeals erred in subjecting the President's final action to broad judicial review for alleged statutory error in the way his subordinates formulated their tentative, nonbinding recommendations under the Base Closure Act.

In approving broad judicial review, moreover, the court of appeals misplaced reliance on *Youngstown* by conflating claims of statutory error and claims of ultra vires Executive conduct, and then by characterizing all challenges to ultra vires conduct as raising constitutional claims. At issue in this case are respondents' claims that (1) the Secretary of Defense failed to transmit certain

information to the Commission and the GAO; and (2) that the Commission based its decision in part on private meetings rather than public hearings. See App., *infra*, 6a-7a n.3. The court of appeals did not suggest that those routine allegations of statutory error on the part of the Secretary or the Commission were themselves of constitutional dimension. If they were, virtually every claim of statutory error by any federal agency would fall in that category, thereby constitutionalizing the entire body of law governing judicial review of agency action. That result would be a radical departure from the long-settled view that judicial review of an agency's compliance with statutory standards and limitations is itself subject to regulation and preclusion by Act of Congress—now, through the APA. Such a dispute arising under a federal statute is not automatically transformed into one arising under the Constitution whenever it is alleged that the President exercised his statutory authority on the basis of recommendations that were formulated by federal agencies in a manner that departed from statutory standards.[10]

By contrast, *Youngstown* involved an emergency Presidential order to seize private steel mills during the Korean War. Although two statutes authorized the seizure of

[10] In *Franklin*, the plaintiffs challenged the counting of overseas military personnel on the ground that it was inconsistent with the Census Act, as well as with the APA and the Constitution. See *Commonwealth* v. *Mosbacher*, 785 F. Supp. 230, 231 n.31 (D. Mass. 1992); *Franklin*, 112 S. Ct. at 2786 n.22 (Stevens, J., concurring in part and concurring in the judgment in part); Brief for Appellees at 74-76. Although the majority did not specifically refer to that claim in this Court, its holding that the appellees had no right of judicial review to raise their statutory challenge under the APA would apply equally to their challenge under the Census Act. Both types of challenges are provided for under the APA, 5 U.S.C. 706(1) (allowing court to set aside agency actions that are "arbitrary and capricous," "an abuse of discretion," or "in excess of statutory * * * authority"), and the absence of "final agency action" therefore precludes judicial review of both.

private property under specified conditions, the government in *Youngstown* conceded that "these conditions were not met," that "the President's order was not rooted in either of the statutes," and that it regarded the pertinent statutory authority as "too cumbersome, involved, and time-consuming." 343 U.S. at 586. The government instead relied on the President's inherent power under the Constitution as authority for the seizure, and this Court held that the Constitution did not furnish that authorization. The claims of ultra vires conduct in *Youngstown* are therefore a far cry from respondents' routine and contested claims of procedural irregularity in the formulation of tentative, nonbinding recommendations for the President under a statute that concededly *does* authorize the President to take the action respondents challenge. Moreover, the action challenged in *Youngstown* directly invaded property rights of the plaintiffs that were independently protected by the Constitution. In this case, by contrast, the court of appeals acknowledged that respondents have no property rights protected by the Constitution in the base closure setting. App., *infra*, 67a-69a. There can be no serious doubt that Congress can decline to provide for judicial challenges to actions of the President or other Executive officials at the behest of individuals whose own constitutional rights are not at stake.[11]

The distinction between routine statutory claims, such as those advanced by respondents here, and claims of

[11] In *Franklin*, the Court concluded that although judicial review under APA standards was precluded, "that does not dispose of appellees' constitutional claims." 112 S. Ct. at 2776 (citing *Webster* v. *Doe*, 486 U.S. 592, 603-605 (1988)). In *Franklin*, the constitutional claim was based on the appellees' own asserted right as voters to an apportionment of Representatives in conformity with the Constitution. See 112 S. Ct. at 2776 (citing *United States Dep't of Commerce* v. *Montana*, 112 S. Ct. 1415 (1992)). And in *Webster* v. *Doe*, it was based on the personal right of the plaintiff under the equal protection component of the Due Process Clause. No such individual rights are at issue in this case.

ultra vires action is illustrated by this Court's precedents addressing sovereign immunity. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949). In such cases, the Court has distinguished between (1) claims that an officer acted "*ultra vires* his authority," which are the proper subject of specific relief, and (2) mere "claim[s] of error in the exercise of that power," which are barred by sovereign immunity. *Id.* at 689-690.[12] As the Court has explained, the pertinent line of demarcation is between claims addressing "the correctness or incorrectness" of a decision and those addressing "the power of [an] official, under the statute, to make a decision at all." *Id.* at 691 n.12; see *Noble* v. *Union River Logging R.R.*, 147 U.S. 165, 174 (1893).[13] Although the distinction is not always simple to apply (see *International Primate Protection League* v. *Administrators of Tulane Education Fund*, 111 S. Ct. 1700, 1708 (1991)), a finding of ultra vires executive action re-

[12] As this Court explained, the theory underlying such cases was that when "the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. Thus, if the officer "is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden," his actions "are *ultra vires* his authority and * * * may be made the object of specific relief." *Ibid.*

[13] For an illustration of a case that involved mere error, see *United States ex rel. Goldberg* v. *Daniels*, 231 U.S. 218 (1913), upon which the Court relied heavily in *Larson*, 337 U.S. at 700-702. In *Goldberg*, the Secretary of the Navy awarded a contract for a surplus vessel to someone other than the high bidder. The high bidder then filed suit to compel the Secretary to deliver the surplus vessel to him. Although the lower courts considered whether the sale was consummated when the Secretary opened the high bid, this Court refused to address the merits of that issue. As the Court later explained in *Larson*, "[w]rongful the Secretary's conduct might be, but a suit to relieve the wrong by obtaining the vessel would interfere with the sovereign behind its back and hence must fail." *Larson*, 337 U.S. at 700-701.

quires a "depart[ure] from a plain official duty" (*Payne* v. *Central Pac. Ry.*, 255 U.S. 228, 238 (1921)), rather than a challenge to action that involves the exercise of executive discretion. See, *e.g.*, *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 110-111 n.20 (1984) (collecting cases); cf. *Board of Liquidation* v. *McComb*, 92 U.S. 531, 541 (1876) (specific relief against violation by state officers of "plain official duty, requiring no exercise of discretion").

Under those principles, the court of appeals in this case erred in holding that respondents' procedural allegation against the Secretary of Defense and the Commission automatically state claims of ultra vires Presidential action. As the court below acknowledged, "the President and Congress * * * may reject the Commission's recommendations for any reason at all," and "the decision on which bases to close is committed by law to presidential discretion." App., *infra*, 46a, 69a. That conclusion cannot be reconciled with the court of appeals' subsequent holding that the President acts wholly beyond his authority if he accepts the Commission's recommendations without verifying that every procedure has been fully observed. Whatever the merits of respondents' claims that the Secretary or the Commission erred, the President was under no "plain official duty" (*Payne*, 255 U.S. at 238) to reject a set of recommendations alleged to be infected by procedural error, and he was not disabled from "mak[ing] a decision at all" in the circumstances presented here. *Larson*, 337 U.S. at 691 n.12.[14] Far from having acted

[14] The only obligation imposed on the President by the Base Closure Act is to decide, in his discretion, whether to approve or disapprove the Commission's recommendations and to give notice of his decision to the Commission and Congress. § 2903(e)(1)-(4). As Judge Alito explained in dissent (App., *infra*, 23a-24a):

> Nothing in the[] provisions of the [Act] suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process. Nothing in these provisions suggests that the President must reject the Commission's package of recommendations if such procedural violations come to his attention. Nothing in these provisions suggests that the President must base his approval or disapproval of the Commission's recommendations exclusively on the record of the proceedings before the Commission. Nothing in these provisions suggests that the President, if he wishes to approve the Commission's recommendations, must do so for the same reasons as the Commission. And nothing in these provisions suggests that the President or the Secretary of Defense must or even can refuse to carry out a base closing or realignment contained in an approved package of recommendations on the ground that the Commission's recommendation regarding the affected base was tainted by prior procedural irregularities.

in excess of his authority under the Base Closure Act, the President did precisely what the Act authorized him to do.

c. The court of appeals' decision in this case conflicts with the First Circuit's recent decision in *Cohen* v. *Rice*, *supra*. The plaintiffs in that case challenged the closing of the Loring Air Force Base in Limestone, Maine, and made many of the same allegations against the Secretary and the Commission that respondents have made here. In particular, the plaintiffs in *Cohen*, like respondents in this case, alleged that the responsible service Secretary did not provide all of the required information to Congress and the GAO, and that the Commission failed to hold the public hearings required under the Act. 992 F.2d at 380. The First Circuit affirmed the district court's dismissal of the action in its entirety, agreeing that *Franklin* was "directly applicable to the facts of the present controversy." 992 F.2d at 381 (quoting *Cohen* v. *Rice*, 800 F. Supp. 1006, 1011 (D. Me. 1992)). The First Circuit explicitly rejected the contention that *Franklin* did not apply because the case before it "involve[d] a challenge to the

Commission's faulty *procedures*" rather than the substance of its recommendations. 992 F.2d at 382. The court emphasized that *Franklin* drew no such distinction and that, in any case, it was "a distinction without a legal difference." *Ibid.* Thus, the court of appeals in *Cohen*, unlike the Third Circuit in this case, did not reach out to recast the plaintiffs' statutory allegations as reviewable claims of unconstitutional Presidential action.

If the President, the Department of Defense, and the Commission are to administer the Base Closure Act in a coherent manner that is consistent across the Nation—and that treats all closures in a single package in a uniform manner—the same agency actions cannot be reviewable in one circuit and unreviewable in another. Further review is therefore warranted to resolve the conflict between the decision below and *Cohen*, and to establish that *Franklin* in fact bars judicial review of procedural claims under the Base Closure Act.

2. The court of appeals also erred in holding in its prior opinion (App., *infra*, 48a-55a) that the Base Closure Act does not "preclude judicial review" under the APA, 5 U.S.C. 701(a)(2). As discussed above (p. 6, *supra*), the district court dismissed this suit in its entirety on the ground that the Base Closure Act implicitly precludes judicial review of all claims arising under the Act. App., *infra*, 85a-88a. In reversing that decision, the court of appeals seriously misapprehended the extent to which judicial intervention is contrary to the structure and purposes of the Base Closure Act.

The court of appeals began its analysis with the general presumption in favor of judicial review of administrative actions. App., *infra*, 40a-41a. In our view, reliance on that presumption is misplaced in the context of the Base Closure Act, which addresses sensitive questions of national security and military policy. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988) (presumption of reviewability "runs aground when it encounters concerns of national security"). As this Court has explained, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530 (citing cases). Indeed, the Third Circuit acknowledged that the Base Closure Act calls for exercise of "the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources." App., *infra*, 46a. Because the base closure process therefore necessarily involves sensitive judgments of military policy (see, *e.g.*, § 2903 (a), (c)(1) and (d)(2)), the court of appeals erred in applying the ordinary administrative law presumption that Congress desires judicial review of the outcome of an administrative process.[15]

Even if the general presumption applies in this setting, moveover, it may be rebutted "whenever [a] congressional intent to preclude judicial review is 'fairly discernible in the statutory scheme.'" *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 351 (1984). The pertinent congressional intent may be found in a variety of sources. The presumption "may be overcome by specific language or specific legislative history that is a reliable indicator of congressional intent." *Id.* at 349. The pertinent congressional intent "may also be inferred from contemporaneous judicial construction barring review and congres-

[15] Although the court of appeals purported to limit its holding to the Secretary's and the Commission's alleged violations of statutory procedures, the effect of such review would be to overturn the President's exercise of discretion in matters of military policy. The Act provides that the President can approve or disapprove the Commission's recommendations for any reason at all (App., *infra*, 46a, 69a); the court of appeals' ruling limits the President's ability to exercise that discretion by holding that he must reject recommendations with which he agrees if his subordinates have not observed every procedural particular alleged to be required under the Act.

sional acquiescence in it, or from the collective import of legislative and judicial history behind a particular statute." *Ibid.* (citation omitted). Most importantly, "the presumption favoring judicial review of administrative action may be overcome by inferences of intent drawn from the statutory scheme as a whole." *Ibid.* When measured against those standards, the Base Closure Act precludes judicial review of the base closure process.

First, the structure of the Base Closure Act indicates that judicial review is incompatible with the statutory scheme. Like its immediate predecessor, the Defense Authorization Amendments and Base Closure and Realignment Act (1988 Act), Pub. L. No. 100-526, 102 Stat. 2623,[16] the 1990 Act was designed to eliminate unnecessary obstacles to base closures and create a "prompt and rational" process for closing obsolete bases.[17] H.R. Conf.

---

[16] The 1988 Act provided for an independent Commission on Base Realignment and Closure. § 203, 102 Stat. 2627-2628. The Commission submitted a report recommending base closures to the Secretary of Defense, who was not authorized to close bases under the 1988 Act unless he approved the report and transmitted it to Congress. §§ 201(1), 202(a)(1), 102 Stat. 2627. The 1988 Act provided a waiting period for Congress to enact a joint resolution of disapproval. § 202(b), 102 Stat. 2627. The 1988 Act provided authority for only one round of base closures.

[17] Previous legislation prohibited base closures unless the Secretary of Defense provided Congress and the public with prior notice; gave a "detailed justification" for the action, including "statements of the estimated fiscal, local economic, budgetary, environmental, strategic, and operational consequences" of the proposed closure; and allowed Congress 60 days to halt the process. Military Construction Authorization Act, 1978, Pub. L. No. 95-82, § 612(a), 91 Stat. 379 (codified at 10 U.S.C. 2687(b) (Supp. I 1977)). Moreover, the 1977 legislation made base closure decisions subject to the National Environmental Policy Act (NEPA), 42 U.S.C. 4331 *et seq.* See 10 U.S.C. 2687(b)(3) (Supp. I 1977). For a variety of reasons (including protracted NEPA litigation), the 1977 statute "effectively prevented [the Department of Defense] from closing any major military installation." Defense Base Closure and Realignment Commission, *Report to the President 1991*, at 1-1 [hereinafter *1991 Report*]; see H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988).

Rep. No. 923, 101st Cong., 2d Sess. 705 (1990); see H.R. Rep. No. 735, 100th Cong., 2d Sess. Pt. 2, at 8 (1988). At the same time, it was recognized that base closure legislation should address the tendency of "political pressures * * * to interfere" with the integrity of the process. H.R. Rep. No. 735, *supra*, Pt. 2, at 8-9; see H.R. Conf. Rep No 923, *supra*, at 705; *1991 Report* at 1-1 to 1-2; App., *infra*, 77a-79a (Alito, J., dissenting in part).

Accordingly, the 1990 Act is structured to minimize the ways in which political maneuvering can delay or derail the base closure process. The Act does so in part by striking a careful balance between the roles of the President and Congress in the process. Although the Act vests the Executive Branch with substantial control over the selection of bases for closure, it also provides for extensive congressional involvement throughout the process. For example, the Act requires the Secretary and the Commission to keep Congress apprised of developments at numerous steps in the development of base closure recommendations for the President. See, *e.g.*, § 2903 (a)(1), (b)(2), (c)(1) and (d)(3). And the process facilitates substantial congressional oversight by adopting streamlined legislative procedures designed to eliminate the usual opportunities for delay and strategic maneuvering. §§ 2904(b), 2908.

A critical aspect of the process is the use of an independent and bipartisan Commission to recommend bases for closure. H.R. Rep. No. 665, 101st Cong., 2d Sess. 341 (1990). To safeguard the Commission's role in the process, the Act provides that its recommendations must be considered as an indivisible package. H.R. Conf. Rep. No. 923, *supra*, at 704. The President may trigger base closures under the Act only by approving "all the

recommendations" of the independent Commission. See § 2903(e)(2) and (4).[18] The Act's expedited legislative procedures, in turn, apply only to a joint resolution of disapproval applying to all the bases that the President approved for closure, and no amendments to the joint resolution may be entertained. § 2908(a)(2) and (d)(2).

By allowing litigants to contest individual base closures after the President has approved and Congress has declined to disapprove a package of base closures, the court of appeals has struck at the heart of the carefully balanced statutory mechanism enacted by Congress. Under the court's decision, private parties—whose elected representatives failed to achieve their goals through the Act's streamlined legislative procedure—will be able to pick apart the end product of that process. If litigants can sue to extract an individual base (such as the Philadelphia Naval Shipyard) from the package of closures and require the Commission to redo its recommendation for that base, then "the President and Congress will be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base." App., *infra*, 82a (Alito, J., dissenting in part).[19] That result is inconsistent with Congress's objective, evident on the face of the Act, to break the political stalemate through the use of a unitary process of base closures superintended by both political Branches.

[18] The President, of course, is free to disapprove the Commission's recommendations in whole or in part. § 2903(e)(3). If he does so, the Commission produces a new set of recommendations. At that point, if the President does not approve "all the recommendations," no base closures can be effectuated under the Act for that round. § 2903(e)(4) and (5).

[19] The court of appeals' ruling also fails to appreciate the interrelationship of the determination to close certain bases, and to reassign functions to various other bases, as part of a single package. If a court enjoins the closing of one base, it will undermine the assumptions on which other parts of the package rest. See App., *infra*, 81a (Alito, J., dissenting in part).

Second, the availability of procedural challenges threatens to reintroduce into the base closure process a significant hazard that the 1988 and 1990 Acts were designed to avoid—protracted delays from litigation. Prior to the enactment of those 1988 and 1990 Acts, litigants effectively blocked base closures by mounting procedural challenges to base closures under NEPA. See H.R. Conf. Rep. No. 1071, *supra*, at 23; note 17, *supra*. Accordingly, the Base Closure Act forecloses all NEPA actions relating to the base selection process, and permits NEPA litigation only with respect to a narrow class of post-selection implementation actions. § 2905(c). Congress restricted the availability of NEPA challenges precisely because it "recognize[d] that [NEPA] has been used in some cases to delay and ultimately frustrate base closures." H.R. Conf. Rep. No. 1071, *supra*, at 23. Congress recognized that NEPA challenges could impede or defeat base closures despite the procedural nature of the litigation, and Congress acted to eliminate the threat of such disruptive procedural litigation. There is no reason to believe that Congress intended to take with one hand what it gave with the other, by barring NEPA challenges to the selection decision while allowing broad procedural attacks on the way the Commission formulates its non-binding recommendations to the President.[20]

[20] Contrary to the court of appeals' view (App., *infra*, 51a), it is not plausible that Congress's disallowance of NEPA suits carries the negative implication that other types of procedural claims may be brought under the Act. As discussed in the text, NEPA cases were the primary litigation-related impediments to base closures, and Congress had explicitly subjected base closure decisions to NEPA in 1977. 10 U.S.C. 2687(b)(3) (Supp. I 1977). Thus, it was necessary for Congress to deal explicitly with NEPA claims in the 1988 and 1990 Acts. In addition, Congress wished to preserve a narrow class of NEPA claims relating to the implementation of base closures (see § 2905(c)(3)); hence, it was necessary for Congress to draw an explicit line between permissible and prohibited NEPA suits.

Third, the court of appeals' ruling jeopardizes the Act's insistence on expedition and finality. See App., *infra*, 75a-77a, 81a-82a (Alito, J., dissenting in part). Based on Congress's recognition that "[e]xpedited procedures * * * are essential to make the base closure process work" (H.R. Rep. No. 665, *supra*, at 384), the Act imposes a series of strict time limits that are designed to bring the base selection process to a prompt conclusion. See pp. 4-5, *supra*. Congress recognized that delay had been one of the primary causes of the stalemate over base closures. See App., *infra*, 75a-77a (Alito, J., dissenting in part); H.R. Conf. Rep. No. 923, *supra*, at 705 (noting that prior base closures had "take[n] a considerable period of time and involve[d] numerous opportunities for challenges in court"). Accordingly, Congress sought "to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and the Congress." App., *infra*, 75a (Alito, J., dissenting in part). Congress's strong emphasis on expedition in the process of selection is incompatible with the availability of protracted litigation to displace the results of that process thereafter.[21]

That conclusion is reinforced by the cyclical nature of the base closure process under the Act. The Act provides for three successive biennial rounds of base closures (see p. 3, *supra*), and the finality of the decisions in each round is critical to planning in the following round. Delay by litigation over the bases closed during one round will inevitably interfere with successive rounds by creating

[21] Even after the base selection process is complete, the Base Closure Act places a continuing premium on expedition and finality. While the Act permits a limited class of NEPA suits concerning implementation of the final base closure decision, the Act subjects such suits to a 60-day time limit. § 2905(c)(3). That strict time limit is inexplicable if speed and finality lose their significance once closure decisions have become final.

uncertainty about the existing base structure and capacity of the Armed Services.

Fourth, the Act's legislative history strongly supports the conclusion that Congress intended to preclude all judicial review. As Judge Alito explained in dissent, the conference report accompanying the 1990 Act "state[s] quite clearly that there would be no APA review of key decisions in the base closing and realignment process." App., *infra*, 73a; see H.R. Conf. Rep. No. 923, *supra*, at 706 ("Specific actions which would not be subject to judicial review include the issuance of a force structure plan * * *, the issuance of selection criteria * * *, the Secretary of Defense's recommendation of closures and realignments * * *, the decision of the President * * *, and the Secretary's actions to carry out the recommendations of the Commission.").[22] Moreover, the Act's legislative history undercuts the court of appeals' distinction between the reviewability of substantive and procedural claims; it evinces a clear concern for the ability of procedural litigation to derail the selection of obsolete bases for closure. See App., *infra*, 70a-72a (Alito, J., dissenting in part) (discussing legislative history on NEPA's applicability).[23]

Fifth, the court's decision creates significant remedial concerns. Although the court of appeals declined to address in detail the appropriate form of relief, it indicated that it would be proper to remand base closure recom-

[22] Although the majority concluded that the legislative history referred only to instances of nonfinal agency action (App., *infra*, 53a-54a), it acknowledged that some of the actions described by the report as unreviewable "concededly do not fit" that explanation. *Id.* at 54a.

[23] In addition, although the court of appeals purported to limit its decision to procedural matters, judicial review will inevitably affect the substance of those decisions if, as respondents have requested, the district court enjoins the closure of the Philadelphia Shipyard and other naval installations.

mendations to the Secretary and Commisison for further proceedings in accordance with the Act. App., *infra,* 55a n.13. The Commission itself, however, goes out of existence after each of the biennial base closure sessions; it meets only during 1991, 1993, and 1995, and the terms of its members (other than the Chairman) expire at the end of the Session of Congress in which they were appointed. § 2902(d)(1) and (e)(1). Accordingly, a court cannot remand the base closure decision to the Commission for further proceedings because the Commission cannot act until it has been assembled for the next biennial round. At that point, the Commission is occupied with the next set of base closures. Moreover, the Act expressly provides that, after expiration of the 45-day period for congressional disapproval of the President's report and certification, the Secretary of Defense "*shall* * * * close all military installations recommended for closure by the President pursuant to section 2903 (e)." § 2904(a) (emphasis added). A court has no authority at that point to interfere with the Secretary's performance of this mandatory duty by reviewing actions of the Secretary or the Commission that took place before the President submitted the report to Congress. Because any meaningful remedy would therefore jeopardize the Act's policies and undermine its timetable and procedures, it is inconceivable that Congress intended to permit any judicial review of the base closure decisions at all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Acting Deputy Solicitor General

JOHN F. MANNING
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

AUGUST 1993

APPENDIX A

Filed May 18, 1993

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON; REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3; WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, Secretary of the Navy; RICHARD CHENEY, Secretary of Defense; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE, THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN, U.S. REP. PETER H. KOSTMAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON, THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

On Appeal From the United States District Court
For the Eastern District of Pennsylvania

(D.C. Civil Action No. 91-4322)

On Remand from the Supreme Court
of the United States
(No. 92-485)

Reargued February 24, 1993

BEFORE: STAPLETON, SCIRICA and ALITO,
Circuit Judges

(Opinion Filed May 18, 1993)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

This action to enjoin the defendants from carrying out a decision to close the Philadelphia Naval Shipyard is before us for the second time. In our initial opinion in this case. *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992), we held, *inter alia*, that plaintiffs' claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Defense Base Closure and Realignment Act of 1990 could proceed in the district court. Our mandate, however, was vacated by the Supreme Court and the case was remanded for reconsideration in light of *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992). After consideration of the impact of *Franklin* upon our prior holding, we conclude that no change in that holding is warranted. We will therefore remand this matter to the district court for further proceedings consistent with our earlier opinion.

I.

A.

In *Franklin*, the Supreme Court was presented with a situation at least superficially similar to the one before us; however, it is the differences between the two cases that we find dispositive. *Franklin* was a suit against the President, the Secretary of Commerce, and a number of other public officials challenging the methods used in the 1990 census and the manner in which the number of seats in the House of Representatives had been allocated to the various states. Plaintiffs' claims were based upon the Administrative Procedure Act (APA) and the Constitution. A three judge panel of the United States District Court for the District of Massachusetts initially found in favor of the plaintiffs and granted the relief sought—relief which included an injunction directing the Secretary of Commerce to alter her reapportionment report and the President to recalculate the number of Representatives per State and transmit the new calculation to Congress. *Franklin*, 112 S. Ct. at 2770.

The Supreme Court reversed. It first analyzed plaintiff's claim under the APA which allows review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (1988). The Court concluded that the Secretary of Commerce's report to the President on the results of the census does not constitute "final agency action" and is therefore unreviewable under the APA because "[t]he President, not the Secretary takes the final action that affects the States." *Franklin*, 112 S. Ct.

at 2775; *see also id.* at 2773 ("The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties."). Next, the Court held that although the President's calculation of the number of Representatives and forwarding of that calculation to Congress is a final action, the President is not an "agency" within the meaning of the Act and thus, the President's action is not reviewable for abuse of discretion under the APA. *Id.* at 2775. Finally, the Court noted that there is judicial review of presidential action to determine whether it violates the Constitution; however, it concluded that the action complained of in *Franklin* was not unconstitutional.

B.

The action currently before us is a suit against the Secretary of the Navy, the Secretary of Defense, and the Defense Base Closure Commission seeking to enjoin the closing of the Philadelphia Naval Shipyard.[1] Under the Defense Base Closure and Realignment Act of 1990 ("the Act"), it is the responsibility of the Secretary of Defense to close the bases designated as a result of the process prescribed by the Act, Pub. L. No. 101-510, §§ 2904-2905, 104 Stat. 1808, 1812-14 (1990), and the primary relief sought here is an order enjoining the Secretary from closing the Shipyard. The alleged basis for this relief is that the process that resulted in the designation of the Shipyard as a base to be closed did not comply with the requirements set forth in the Act.

---

[1] The President is not a defendant in this suit.

In our prior opinion, we first held that there could be no judicial review prior to the end of the process required by the Act because there was no final decision prior to that point that had an adverse impact on the plaintiffs.[2] We also concluded that the decisionmaking of the President under the Act was committed to his discretion and not properly reviewable. *Specter*, 971 F.2d at 946 ("One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure . . . ."). Similarly, we held that the decisionmaking of other federal officials (i.e. the Secretary of Defense, the members of the Commission) challenged by plaintiffs was committed to their discretion and not judicially reviewable. *Id.* at 950-53. However, we also held that the district court could review the claim that the closing of the Shipyard would be illegal because it would be the product of a process inconsistent with certain procedural mandates of the Act.[3] Specifically, we concluded:

---

[2] More specifically, we held that action could be judicially reviewed "only if its impact upon plaintiffs is direct and immediate . . . . One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decision are merely preliminary in nature." *Specter*, 971 F.2d at 946.

[3] For instance, we held that the allegation that "the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendation" as required by § 2903(c)(4) of the Act was judicially reviewable. *Specter*, 971 F.2d at 952. Similarly, we also held reviewable the plaintiffs' contention "that the Act requires

> [W]hile Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions, Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made.

Id. at 947 (footnote omitted).

Although we noted that because "it is the implementation of the President's decision that we have

---

the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy." *Id.* at 952-53.

We stressed, however, that the extent of judicial review in this context was very limited and that plaintiffs, while purporting to complain about specific procedural defects, were in large part seeking to get the district court to second guess decisions committed by the Act to executive discretion. *Id.* at 953. It is apparent to us from plaintiffs' Brief for Appellants on Remand that plaintiffs have failed to acknowledge the limited character of the review our prior opinion permits.

been asked to enjoin, . . . at least in one sense, we are here asked to review a presidential decision," *id.* at 945, we concluded that this would not bar review of plaintiffs' procedural claims:

> Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represent a codification of the common law. 5 Kenneth C. Davis, *Administrative Law* 28:4 (1984), *cited with approval in Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *see also ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *see also INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) ("[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); *Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review"). . . . It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

Id. at 945.

III.

Examination of our prior decision in light of *Franklin* suggests to us that no change in outcome is required. *Franklin*'s holding that the Secretary of Commerce's report to the President did not constitute a reviewable final action because it did not have an immediate and direct impact on the plaintiffs confirms our initial conclusion that there was no reviewable final action here until after the President designated the Shipyard as a facility to be closed and Congress failed to overturn that action. *See Specter*, 971 F.2d at 945 ("We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b).").

More importantly, the Court's conclusion that the President is not an "agency" under the APA, and thus, presidential action is not reviewable for abuse of discretion under the APA's standards is entirely consistent with our prior decision in which we assumed, without deciding, that the President is not an agency within the meaning of the APA.[4] Because our prior holding was not based on the existence of APA abuse of discretion review, but rather on the belief that courts may review actions taken at the direction of the President to determine whether those actions are within applicable constitutional and statu-

---

[4] As previously noted, we explicitly concluded that our holding permitting review of plaintiffs' claims that the closing process had violated the specific procedural mandates of the statute would be "the same whether or not the APA applies to presidential decisionmaking." *Specter*, 971 F.2d at 945.

tory authority, a modification of our prior mandate only would be warranted if *Franklin* might be read as foreclosing the limited review we previously upheld.

In *Franklin*, the Court declined only to review the President's decision under the APA. It expressly sanctioned judicial review of presidential decision making for consistency with the Constitution and said nothing about review of presidential action for consistency with the statute authorizing such action. In concluding in our earlier opinion that judicial review was available here, we relied upon the existence of judicial review prior to the adoption of the APA and upon various authorities indicating that the judicial review provisions of the APA represent a "codification of the common law." *Id.* at 945. While we there described this extra-APA review as common law review, our reexamination of the relevant authorities in light of *Franklin* has persuaded us that there is a constitutional aspect to the exercise of judicial review in this case—an aspect grounded in the separation of powers doctrine. As a result, we believe *Franklin* provides affirmative support for judicial review in this case. We would, in any event, be reluctant to infer from *Franklin*'s silence on the matter a prohibition of judicial review where presidential action is alleged to be in conflict with non-discretionary mandates of the authorizing statute because the Court had no occasion to consider that issue in *Franklin*. There, the only non-constitutional allegation made by (and, indeed, available to) plaintiffs was that the proposed action represented an abuse of discretion (*i.e.*, arbitrary and capricious conduct) prohibited by the APA. Here, by contrast, plaintiffs allege that the process underlying the decision to close the Shipyard violated specific nondiscretionary provisions of the Base Closing Act—the only authority advanced by the defendants for the closing.

We read *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), to stand for the proposition that the President must have constitutional or statutory authority for whatever action he wishes to take and that judicial review is available to determine whether such authority exists. *See id.* at 585; *see also United States v. Noonan*, 906 F.2d 952, 955 (3d Cir. 1990) ("It is well established under our tripartite constitutional system of government that the President stands under the law. The President's power, if any . . . must stem from an act of Congress or from the Constitution itself." (citing *Youngstown Steel*)); *National Treasury Employees Union v. Nixon*, 492 F.2d 587, 611 (D.C. Cir. 1974) (" '*Youngstown* represents the Judicial power, by compulsory process or otherwise, to prohibit the Executive from engaging in actions contrary to law. *Youngstown* represents the principle that no man, cabinet minister, or Chief Executive himself, is above the law.' " (quoting *Nixon v. Sirica*, 487 F.2d 700, 793 (Wilkey, J., dissenting)). *Youngstown* also stands for the proposition that it is the constitutionally-mandated separation of powers which requires the President to remain within the scope of his legal authority. *See, e.g., National Treasury Employees Union*, 492 F.2d at 604 ("[T]he judicial branch of the Federal Government has the constitutional duty of requiring the executive branch to remain within the limits stated by the legislative branch."); *see also* U.S. Const. Art. II, § 3 ("[T]he President shall take care that the laws be faithfully executed . . . ."). Indeed,

we note that the *Youngstown* Court, in invalidating the President's action, explicitly noted that the President was statutorily authorized to seize property under certain conditions, but that those conditions were not met in the case before it. *Youngstown*, 343 U.S. at 585-86. Because a failure by the President to remain within statutorily mandated limits exceeds, in this context as well as that of *Youngstown*, not only the President's statutory authority, but his constitutional authority as well, our review of whether presidential action has remained within statutory limits may properly be characterized as a form of constitutional review. That such constitutional review exists is explicitly reaffirmed by *Franklin*. 112 S.Ct. at 2776 (citing *Youngstown*).

The plaintiffs in this case, unlike the plaintiffs in *Franklin*, do not ask the court to review under the APA for arbitrary and capricious conduct. Rather, they allege that closing the Shipyard would be inconsistent with specific, nondiscretionary directives of the Base Closing Act—the only authority advanced by the defendants for their proposed action. The President, no less than his lieutenants, must have statutory or constitutional authority for his actions and where, as here, the only available authority has been expressly confined by Congress to action based on a particular type of process, judicial review exists to determine whether that process has been followed.[5]

[5] In holding here that the President must have at his disposal information collected in accordance with statutory procedures, we do not hold that the district court may review the entirely distinct question of whether and to what extent the President uses the information. As we previously held, the Act commits that decision to the President's discretion. *Specter*, 971 F.2d at 946.

IV.

The defendants insist that there can be no judicial review in this case because such review is barred by the doctrine of sovereign immunity. We disagree.

We first note that limited judicial review of federal action has long been available at common law:

> [W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief.

Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689 (1949); *see also Youngstown Steel*, 343 U.S. at 585-87. Although this principle is limited, *see, e.g.*, *Larson*, 337 U.S. at 690 ("A claim of error in the exercise of [delegated] power is . . . not sufficient."),[6] as counsel for the defendants con-

[6] *Larson* was essentially a breach of contract action against an agent of the federal government. The Court rejected pliantiff's contention that the agent's breach was *ultra vires* and thereby stripped of sovereign immunity protection; instead, it held that because the agent was authorized to "administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment," his actions were within delegated authority and were therefore protected by sovereign immunity: "[I]f the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency." *Larson*, 337 U.S. at 695.

ceded at oral argument, and as both *Youngstown Steel* and *Franklin* make clear, judicial review of the constitutionality of executive action is not barred by the doctrine of sovereign immunity. Thus, where, as here, plaintiffs allege that presidential action has failed to comply with the mandatory procedural requirements of the only statute authorizing such action and has thereby violated the constitutionally-mandated separation of powers, sovereign immunity concerns do not apply.

Even if the inapplicability of sovereign immunity in this context were not clear from the doctrine enunciated in *Larson* and *Youngstown Steel*, however, we believe this case would still be controlled by the express waiver found in the APA:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

5 U.S.C. § 702 (1988).

Here, plaintiffs do not seek monetary damages; they seek injunctive relief.[7] Plaintiffs also state a claim that the Secretary of the Navy, the Secretary of Defense, and the Base Closure Commission have acted under color of legal authority in violation of the Act and that the Secretary of Defense, similarly acting under color of legal authority, is threatening

[7] Effective relief can be granted by an order prohibiting the Secretary of Defense from closing the Shipyard.

to close the Shipyard as the final step of an illegal process. This is thus a situation that § 702 literally reads on. It is also a situation that precisely fits the congressional intent behind this waiver of sovereign immunity. *See, e.g.*, H.R. Rep. No. 1656, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6121, 6121 ("The proposed legislation would amend section 702 of title 5, U.S.C., so as to remove the defense of sovereign immunity as to a bar to judicial review of Federal administrative action . . . ."); *id.* at 9, 1976 U.S.C.C.A.N. at 6129 ("[T]he time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity."); 4 Kenneth C. Davis, *Administrative Law Treatise* § 23:19, at 192 (2d ed. 1984) ("The meaning of the 1976 legislation is entirely clear on its face, and that meaning is fully corroborated by the legislative history. That meaning is very simple: Sovereign immunity in suits for relief other than money damages is no longer a defense.").[8] Our cases are also clear that the waiver of sovereign immunity contained in § 702 is not limited to suits brought under the APA. *See Johnsrud v. Carter*, 620 F.2d 29, 31 (3d Cir. 1980); *Jaffee v. United States*, 592 F.2d 712 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); *see also* 4 Davis, *supra*, § 23:19, at 195 ("The abolition of sovereign immunity in § 702 is

[8] The legislative history of the immunity waiver also indicates congressional recognition of the *ultra vires* doctrine and the difficulties and complexities involved in its application: it envinces an intent to eliminate the need for "wispy fictions" in favor of a clear waiver. *See* H.R. Rep. No. 1656, *supra*, at 5-7, 1976 U.S.C.C.A.N. at 6125-28.

not limited to suits 'under the Administrative Procedure Act'; the abolition applies to every 'action in a court of the United States seeking relief other than money damages . . .' No words of § 702 and no words of the legislative history provide any restriction to suits 'under' the APA.").

The only argument we can conceive against the applicability of § 702 here is that the President was involved at one stage of the process that led to the allegedly illegal action that will injure plaintiffs. While, as we earlier concluded, the nature of the role assigned to the President by the Act makes his decisionmaking unreviewable, the fact that he played a role provides no justification for holding the process and the final executive action immune from review for compliance with the mandatory procedural requirements of the Act. While suits, like *Franklin*, seeking to secure presidential action or forbearance pose special problems, those problems are not presented in the situation before us.[9] As Justice Scalia

[9] Indeed, given *Franklin*'s holding that the President is not an "agency" within the meaning of the APA, the waiver of sovereign immunity contained in § 702 may not apply to suits against the President. Nevertheless, this only potentially creates a barrier to suit where the President is named as a defendant and/or relief can only be effective if directed at the President—a situation not present here. While we do not regard *Franklin* as turning on sovereign immunity doctrine, we note that § 702 might not waive sovereign immunity in the situation there before the Court. As the *Franklin* Court recognized, "it is President's personal transmittal of the report to Congress that settles the reapportionment." *Franklin*, 112 S. Ct. at 2775. In *Franklin*, it appears that the only effective relief was relief that would require the President's

explained in his opinion in *Franklin*, the fact that the federal courts "cannot direct the President to take a specified executive act" does not

> in any way suggest that Presidential action is *unreviewable*. Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive, see, *e.g.*, *Youngstown Sheet & Tube Co v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *Panama Refinancing Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935)—just as unlawful legislative action can be reviewed, not by suing Members of Congress for the performance of their legislative duties, see, *e.g.*, *Powell v. McCormack*, 395 U.S. 486, 503-506, 89 S.Ct. 1944, 1954-1956; 23 L.Ed.2d 491 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 87 S.Ct. 1425, 18 L.Ed.2d 577 (1967); *Kilbourn v. Thompson*, 103 U.S. 168, 26 L.Ed. 377 (1881), but by enjoining those congressional (or executive) agents who carry out Congress's directive.

Franklin, 112 S. Ct. at 2790 (Scalia, J., concurring).

V.

Accordingly, we conclude that nothing in *Franklin* suggests that our prior approach to this case was incorrect. We reaffirm our prior opinion and we will

forbearance. *See Franklin*, 112 S. Ct. at 2790 (Scalia, J., concurring) ("[W]e cannot remedy appellees' asserted injury without ordering declaratory or injunctive relief against appellant President Bush.").

remand to the district court for further proceedings consistent therewith. In light of the objectives of the Act discussed in our prior opinion, the district court should conduct those proceedings as expeditiously as possible.

Alito, *Circuit Judge*, dissenting.

The majority rests its decision on arguments that are not properly before us, since the plaintiff-appellants did not raise them either before or after remand from the Supreme Court. Moreover, I believe that the majority's arguments are wrong on the merits and may have unfortunate future implications. I therefore respectfully dissent.

I.

When this case was initially before us, the majority held that the closing of the Philadelphia Naval Shipyard was subject to judicial review to determine whether certain procedural requirements of the Defense Base Closure and Realignment Act of 1990 had been satisfied. *Specter v. Garrett*, 971 F.2d 936 (3d Cir. 1992). The Supreme Court subsequently decided *Franklin v. Massachusetts*, 112 S. Ct. 2767 (1992), which concerned, among other things, whether the Administrative Procedure Act authorized review of actions taken under a statutory scheme similar to that in the Defense Base Closure and Realignment Act. The Court held that the Secretary of Commerce's report to the President concerning the total population by states as revealed by the decennial census is not "final agency action" reviewable under the APA. 5 U.S.C. § 704, and that actions taken by the President are not subject to APA review. After handing down its decision in *Franklin*, the Supreme Court vacated this court's prior decision in this case and remanded for reconsideration in light of *Franklin*, *O'Keefe v. Specter*, 113 S. Ct. 455 (1992)[1]

[1] Neither of the arguments suggested by *Franklin*—i.e., that the recommendations of the Base Closure Commission do not

On remand, the plaintiffs vigorously contended that the statutory scheme in *Franklin* is materially different from the scheme involved here and that *Franklin* therefore does not bar review *under the APA*. The plaintiffs did not argue, as the court now holds, that they were entitled to non-APA review based on either common law or separation of powers principles. Nor had the plaintiffs advanced either of those theories when this case was initially before us or, as far as I can determine, when the case was in the district court. The majority, however, chooses to sidestep the APA argument that the plaintiffs have pressed. Instead, the majority grounds its decision on the common law and separation of powers arguments that it has devised and injected into this case.

I cannot endorse this approach. I would address the argument that the plaintiffs have raised and that the parties have briefed—i.e., whether, despite *Franklin*, the closing of the Shipyard is reviewable under the APA. The First Circuit recently considered *Franklin*'s effect on judicial review under the Defense Base Closure and Realignment Act. *Cohen v.*

---

constitute "final agency action" under the APA and that presidential action is not reviewable under the APA—was raised by the defendants when this appeal was first before us. The defendants contend that we must nevertheless reach these issues because they are jurisdictional. Whether or not an appellate court would always be compelled to consider issues of this nature even if they are not raised by the parties, I believe it is appropriate for us to reach them here. If we refused to reach these issues now, the case would be remanded, and the defendants could then raise them before the district court. Under these circumstances, our refusal to entertain these issues at the present time might further delay the expeditious disposition of this case.

Rice, 92-2427, 1993 LW 131914 (1st Cir. May 3, 1993). The plaintiffs in that case alleged that the process had been tainted by "faulty procedures, e.g., failing to hold public hearings and failing to provide information to Congress and the GAO." *Id.* at *6. The First Circuit held that under *Franklin* APA review for these claims was unavailable. Because I agree that the statutory scheme at issue here is not materially distinguishable from the scheme in *Franklin*. I would hold that APA review is unavailable. And I would go no further.

II.

Since the majority has gone further, however, and since the majority's analysis may affect future cases. I will explain briefly why I believe the majority's analysis is flawed. The majority opinion, as I understand it, reasons as follows. First, "[t]he President must have constitutional or statutory authority for whatever actions he wishes to take." Majority Typescript at 10. Second, judicial review is available outside the APA to determine whether presidential action violates or exceeds that authority. *Id.* at 10-12. Third, under the Base Closure and Realignment Act, the President lacks statutory authority to approve or implement the closing of a base if the Base Closure Commission's recommendation regarding that base was tainted by violations of the Act's procedural requirements.[2] Therefore, since the plaintiffs in this

---

[2] The majority puts it as follows (majority typescript at 8), quoting *Specter v. Garrett*, 971 F.2d 936, 947 (3d Cir. 1992)):

> Congress intended that domestic bases be closed *only* pursuant to an exercise of presidential discretion *informed*

case allege that such procedural violations occurred with respect to the Philadelphia Naval Shipyard, the President's approval of the closing of the Shipyard and/or the Secretary of Defense's implementation of the closing are subject to non-APA judicial review.

Putting aside whatever else may be said about this analysis, it seems plain to me that its third step is incorrect, for the Base Closure and Realignment Act does not limit the President's authority in the way the majority suggests. The Act does not require the President to reject the Commission's package of recommendations if the recommendations regarding one or more bases are tainted by procedural violations. Nor does the Act require or authorize the President or his subordinates to refrain from carrying through with the closing or realignment of such bases following presidential approval of the Commission's package and the expiration of the period for congressional disapproval.

The President's powers and responsibilities under the Base Closure and Realignment Act are clearly set out in Section 2903(e). In brief, the President, after receiving the Commission's package of recommenda-

---

by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.

The majority later adds that the President's authority under the Base Closure and Realignment Act to approve or order the closing of a base "has been expressly confined by Congress to action based on a particular type of process." Majority typescript at 12. In addition, the majority states that the President's subordinates are "threatening to close the Shipyard as the final step of an illegal process." Majority typescript at 13.

tions by July 1 of the year in question, must decide whether to accept the entire package or return it to the Commission. If, as was the case in 1991, the President decides to accept the package, he must transmit a report containing his approval to the Commission as well as to Congress. He must also transmit a copy of the Commission's recommendations and a certification of his approval to Congress. Section 2903(e)(1), (2). Congress then has 45 days to disapprove the package (Section 2904(b)), and if, as was the case in 1991, Congress does not disapprove, the Secretary of Defense "shall" close and realign bases in accordance with the package. Section 2904(a).

Nothing in these provisions suggests that the President, upon receiving the Commission's recommendations, must determine whether any procedural violations occurred at any prior stage of the statutory process. Nothing in these provisions suggests that the President must reject the Commission's package of recommendations if such procedural violations come to his attention. Nothing in these provisions suggests that the President must base his approval or disapproval of the Commission's recommendations exclusively on the record of the proceedings before the Commission. Nothing in these provisions suggests that the President, if he wishes to approve the Commission's recommendations, must do so for the same reasons as the Commission. And nothing in these provisions suggests that the President or the Secretary of Defense must or even can refuse to carry out a base closing or realignment contained in an approved package of recommendations on the ground that the Commission's recommendation regarding the

affected base was tainted by prior procedural irregularities.

Under the plain language of the Base Closure and Realignment Act, the President's sole responsibility, upon receiving a package of recommendations from the Commission, is to decide within a very short period whether, based on whatever facts and criteria he deems appropriate, the entire package of recommendations should be accepted or whether the recommendations should be returned to the Commission. After the President has approved a package of recommendations and the time for congressional disapproval has expired, the sole responsibility of the Secretary of Defense is to carry out the indicated closings and realignments. In the case before us, this is precisely what the President did and what the Secretary of Defense wishes to do, and therefore I see no possible ground for arguing that the Executive violated any statutory command or exceeded its statutory authority at these stages of the base closure and realignment process.[3]

The Base Closure and Realignment Act calls for three cycles of recommended closures and realignments—in 1991, 1993, and 1995. In this case, we are still considering a closure that was recommended and approved in the first cycle. In the meantime, the sec-

[3] As I noted in my prior dissent (971 F.2d at 956 n.2), the plaintiffs are not challenging the propriety of anything that occurred after the transmission of the Commission's recommendations to the President. Rather, their claims relate to actions taken at earlier stages. But as the majority itself has recognized, actions taken prior to the end of the process required by the Act had no adverse impact on the plaintiffs and thus are not subject to judicial review under any theory. Majority typescript at 7 & n.2.

ond cycle is already well underway. When Congress enacted the Base Closure and Realignment Act, it knew that unnecessary military installations can waste enormous sums of money and that litigation can effectively delay closings and realignments for years. In my view, Congress clearly wanted to put an end to these delays, but our court, by allowing judicial review of base closings and realignments, is frustrating the implementation of Congress's intent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON; REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3; WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVNRNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMAYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY; RICHARD CHENEY, SECRETATY OF DEFENSE; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE; THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN; U.S. REP. PETER H. KOSTAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON; THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

Filed April 17, 1992

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 91-4322)

Argued January 28, 1992

Before: STAPLETON, SCIRICA and ALITO,
Circuit Judges

(Opinion Filed April 17, 1992)

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

I.

This is an action to enjoin the Secretary of Defense from carrying out a decision to close the Philadelphia Naval Shipyard ("Shipyard"). The plaintiffs-appellants ("plaintiffs") are Shipyard workers; their unions; members of Congress from Pennsylvania and New Jersey; the States of Pennsylvania, New Jersey, and Delaware, and officials of those States; and the City of Philadelphia. The defendants-appellees ("defendants") are the Secretary of Defense, the Secretary of the Navy, and the independent Defense Base Closure and Realignment Commission ("Commission") and its members.

The Defense Base Closure and Realignment Act of 1990 ("the Act") is the latest in a series of statutes enacted by Congress during the past fifteen years to regulate the process by which domestic military bases are closed and realigned. In 1977, Congress passed legislation allowing the Secretary of Defense to close a particular base only after (1) notifying the Committees on Armed Services of the Senate and House of Representatives of the bases seletced for closure; (2) submitting to these Committees an evaluation of the various consequences of the closure (including

the local economic, environmental, budgetary and strategic consequences); and (3) deferring action for at least sixty days, during which time Congress could act legislatively to halt the closure or realignment. 10 U.S.C. § 2687(b) (Supp. IV 1980). The statute also required the Secretary to comply with the requirements of the National Environmental Policy Act of 1969 ("NEPA"). *Id.*

Eleven years later, Congress enacted the Base Closure and Realignment Act of 1988, the immediate predecessor of the 1990 Act. Pub. L. No. 100-526, §§ 201-209, 102 Stat. 2623, 2627-34 (1988). Under the 1988 Act, the Secretary of Defense could no longer unilaterally choose bases for closure. Instead, that Act vested a new independent commission with the power to recommend bases for closure. *Id.* §§ 201(1), 203(b)(1-2), 102 Stat. at 2627-28. These recommendations were to be presented to the Secretary of Defense for approval or disapproval in their entirety. *Id.* §§ 201(1), 202(a)(1), 102 Stat. at 2627. If the Secretary approved the recommendations, the 1988 Act gave Congress 45 days within which to disapprove them. *Id.* § 202(b), 102 Stat. at 2627. The 1988 Act explicitly exempted the base closure decisions of the Commission and the Secretary from the requirements of NEPA. *Id.* § 204(c)(1), 102 Stat. at 2630. The legislative history of the 1988 Act indicates that Congress dropped the NEPA requirements in an effort to avoid delays.[1]

---

[1] *See* H.R. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3395, 3403 ("[t]he conferees recognize that [NEPA] has been used in some cases to delay and ultimately frustrate base closures, and support the narrowing of its applicability for closures and realign-

The 1988 Act was not a permanent mechanism for closing and realigning military installations, but was rather a one-time exception to the process set forth in the 1977 legislation. In January 1990, in actions governed only by the 1977 Act, the Secretary of Defense proposed another round of closures. Members of Congress voiced concern about the Secretary's decisionmaking having "raised suspicions about the integrity of the base closure selection process." H.R. Conf. Rep. No. 923, 101st Cong., 2d Sess. 705 (1990) ("House Conference Report"), *reprinted in* 1990 U.S.C.C.A.N. 3110, 3257. Moreover, House conferees later noted that base closures and realignments under the 1977 legislation took "a considerable period of time and involve[d] numerous opportunities for challenges in court." House Conference Report at 705, 1990 U.S.C.C.A.N. at 3257.

Congress subsequently enacted the Defense Base Closure and Realignment Act of 1990. Section 2901 of this Act declares that the law's purpose "is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States." Pub. L. No. 101-510, § 2901 (b), 104 Stat. 1808 (1990).[2] The Act, which governs three rounds of base closures (in 1991, 1993, and 1995), retains the basic features of the 1988 Act. An independent Commission, to be appointed by the President with the advice and consent of the Senate, is to meet in each of the three years. § 2902(a), (e).

---

ments under this act. However, they also believe that the NEPA goals of public disclosure and clear identification of potential adverse impacts . . . should be protected").

[2] In the interest of brevity, citations to the Act will hereinafter be limited to the section number only.

The Secretary of Defense must provide Congress and the Commission with a six-year "force structure plan" that assesses national security threats and the force structure needed to meet them. § 2903(a)(1)-(2). The Act also requires the Secretary to formulate criteria for use in identifying bases for closure or realignment; these criteria must be published in the Federal Register for public notice and comment, and they must be presented to Congress which evaluates and may disapprove them. § 2903(b).

For the first round of base closures, the Act requires the Secretary to recommend base closures and realignments by April 15, 1991, based on the force structure plan and final criteria. § 2903(c)(1). The Commission is then charged with reviewing these recommendations and with the preparation of a report for the President containing its assessment of the Secretary's proposal and its own recommendations for base closures. § 2903(d)(2). The Act requires the Commission to hold public hearings on the Secretary's recommendations, § 2903(d)(1), and authorizes the Commission to change any of the Secretary's recommendations if they "deviate[] substantially" from the force structure plan and the final criteria. § 2903(d)(2)(B). In its report to the President, the Commission must justify any departure from the Secretary's list of recommendations. § 2903(d)(3). The Commission is to be assisted in its task by the General Accounting Office ("GAO"), to which the Secretary must give all information used in making his initial recommendations, § 2903(c)(4), and which must report on the Secretary's recommendations to Congress and the Commission, § 2903(d)(5).

Once the Commission has made its recommendations, the Act requires that they be presented to the President for his review. § 2903(e). The President may approve or disapprove the Commission's recommendations in whole or in part, and must transmit his determination to the Commission and Congress. § 2903(e)(2)-(3). If the President approves the Commission's recommendations, Congress has 45 days from the date of this approval to pass a joint resolution disapproving of the Commission's recommendations in their entirety. §§ 2904(b), 2908. If such a resolution is enacted, the Secretary of Defense may not close the bases approved for closure by the President. § 2904(b). If the President disapproves the Commission's recommendations in whole or in part, he returns them to the Commission. The Commission reconsiders its recommendations in light of the President's actions and resubmits a revised list for the President's consideration. § 2903(e)(3). If the President does not transmit to Congress an approved list of recommendations by September 1 of any year in which the Commission has transmitted recommendations to the President, the base closure process for that year is terminated. § 2903(e)(5).

The Act contains several important provisions which were absent from predecessor base closure statutes, including, *inter alia*, the requirement that the Commission hold public hearings on the Secretary of Defense's closure recommendations, § 2903(d)(1); the requirement that all meetings of the Commission be open to the public, except where classified information is being discussed, § 2902(e)(2)(A); the requirement that a force structure plan be prepared, § 2903(a); the requirement that final criteria be developed published and submitted for

congressional consideration, § 2903(b)-(c); the requirement that the Secretary consider all military installations "equally without regard to whether or not the installation has been previously considered or proposed for realignment," § 2903(c)(3); and the requirement that the Secretary transmit to the Comptroller General "all information used by the Department in making its recommendations to the Commission for closures and realignments" so that the GAO can analyze the Secretary's recommendations and aid the Commission in its deliberations. §§ 2903(c)(4), 2903(d)(5)(A)-(B).

In April 1991, the Secretary of Defense recommended the closure or realignment of a long list of domestic bases including twelve naval facilities. *See* 56 Fed. Reg. 15184 (April 15, 1991). Among the naval facilities recommended for closure was the Shipyard. The Commission subsequently held public hearings in Washington, D.C., and Philadelphia. During these hearings the Commission heard testimony from Department of Defense officials, legislators, and other experts. The Commissioners visited the major facilities recommended for closure, including the Shipyard. The GAO forwarded to the Commission a report on the Secretary's recommendations and assisted the Commission in its analysis of the Secretary's recommendations.

The Commission ultimately recommended that two of the naval facilities that the Secretary recommended for closure remain open, but concurred with the Secretary's recommendation that the Shipyard be closed. In all, the Commission recommended to the President that 34 installations be closed and 48 realigned. 1991 Defense Base Closure and Realignment Report to the President at vii-viii. President Bush approved

all of the recommendations of the Commission, including the closure of the Shiypard. Following the President's approval, the House and Senate Armed Services Committees held hearings on the Commission's recommendations. On July 30, 1991, the House rejected a proposed resolution of disapproval of the Commission's recommendations by a vote of 364-60, thus authorizing the Secretary to proceed with the closures and realignments. 137 Cong. Rec. H6006 (daily ed. July 30, 1991).

Plaintiffs [3] filed their original complaint in the district court on July 8, 1991, and an amended complaint on July 19, 1991.[4] In the amended complaint,

---

[3] Plaintiffs include United States Senators Arlen Specter and Harris Wofford of Pennsylvania, Bill Bradley and Frank R. Lautenberg of New Jersey; Governors Robert P. Casey of Pennsylvania, James J. Florio of New Jersey, and Michael N. Castle of Delaware; Attorneys General Ernest D. Preate, Jr. of Pennsylvania, and Robert J. Del Tufo of New Jersey; United States Representatives Robert E. Andrews, R. Lawrence Coughlin, Peter H. Kostmayer, and Robert A. Borski; the City of Philadelphia; the International Federation of Professional and Technical Engineers, Local 3, and its President Howard J. Landry; the Metal Trades Council, Local 687 Machinists, and its President William F. Reil; and the Planners Estimators Progressman & Schedulers Union, Local No. 2, and its President Ronald Warrington.

[4] Plaintiffs filed their original complaint before President Bush approved the Commission's recommendations. As we shall see, judicial review is not available at this preliminary stage; nevertheless, because the President made his decision while this suit was pending, we are not presented with a jurisdicitional defect. "[I]n this Court, a 'premature appeal taken from an order which is *not final* but which is followed by an order that *is final* may be regarded as an appeal from the final order in the absence of a showing of prejudice to the other party.' *Richerson v. Jones*, 551 F.2d 918, 922 (3d Cir. 1977) (emphasis in original)." *Westinghouse Elec. Corp. v. United States*, 598 F.2d 759, 766 n.22 (3d Cir. 1979) (noting that court retained jurisdiction where appeal was filed subsequent to preliminary order of Nuclear Regulatory Commission, but before issuance of final NRC order). *See also Dowling v. City of Philadelphia*, 855 F.2d 136, 138 (3d Cir. 1988) (distinguishing situation where notice of appeal is premature under FRAP 4(a)(4)).

plaintiffs allege that defendants [5] violated various provisions of the Act.

To summarize briefly the allegations: In Count I plaintiffs allege that the Secretaries of Defense and the Navy violated the Act by withholding information pertinent to the decisionmaking process, by failing to apply the final criteria and force structure plan evenhandedly to all installations, and by failing to implement record-keeping and internal controls. In Count II, plaintiffs charge the Commission with violating the Act by basing its decisions on information supplied by the Navy by not made available to the GAO, Congress or the public, by failing to apply the final criteria and force structure plan evenhandedly, and by ignoring the conclusions of the GAO. Finally in Count III, the Shipyard employee and union plaintiffs charge all defendants with violating their due process rights under the Fifth Amendment to the Federal Constitution by disregarding the procedures set forth in the Act in deciding to close the Shipyard.

---

[5] Defendants include the Secretary of the Navy, H. Lawrence Garrett, III; the Secretary of Defense, Richard Cheney; the Defense Base Closure and Realignment Commission and its members James A. Courter, William L. Ball, III, Howard H. Callaway, Duane H. Cassidy, Arthur Levitt, Jr., James C. Smith, II, and Robert D. Stuart, Jr.

Plaintiffs filed motions for a preliminary injunction and expedited discovery in July. On August 16, defendants filed a motion to dismiss. After a hearing on October 25, 1991, the district court issued its order dismissing the complaint with prejudice on November 1, 1991. The district court found that the legislative history of the Act, as well as the law's purpose to provide for timely closure of military bases, indicate a clear legislative intent to preclude judicial review. *Specter v. Garrett*, No. 91-4322, slip op. at 1-4 (E.D. Pa. November 1, 1991). As an alternative ground for its holding, the court held that this case is one which is "impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government," *id.* at 5, and as a result presents a nonjusticiable political question. *Id.* at 4-7.[6] Plaintiffs timely filed a notice of appeal.

II.

The threshold issue in this appeal is one of standing. Defendants assert that none of the plaintiffs have standing to litigate the issues raised in the complaint. Because the position of each of the plaintiffs is the same and because we conclude that the Shipyard employees and their union have standing, we need not address the standing of the remaining plaintiffs. *See, e.g., City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 485 (D.C. Cir. 1990).

---

[6] In addition to the two issues addressed by the district court, the appellees argued that none of the appellants had standing to bring the suit, and that the unions' due process claim failed to state a valid constitutional claim. The district court did not reach these issues.

A person who seeks standing to challenge agency action must show (1) injury in fact and (2) that his interests are arguably within the zone of interests intended to be protected by the statute or constitutional provisions on which the claim is based. *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 152-53 (1970). A showing of injury in fact is required by the constitutional limitation of federal court jurisdiction to actual cases or controversies. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976). The injury must be concrete and one which can be addressed by the court should the plaintiff prevail on the merits. *Id.* at 37-38. This test is intended to ensure that complainants have a "personal stake" in the outcome of the proceedings. *Id.*

There can be no doubt that Shipyard employees have a personal stake in these proceedings. If the shipyard is closed, their jobs will be lost. If they prevail on their claim, it is within the power of the district court to grant effective relief. Thus, the Shipyard employees meet the injury in fact requirement.

To satisfy the zone of interests requirement, a plaintiff must "establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. ——, 110 S. Ct. 3177, 3186 (1990) (emphasis in original). As explained by the Supreme Court,

> The "zone of interest" test is a guide for deciding whether, in view of Congress' evident intent

> to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision. In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399-400 (1987) (footnote omitted). We must thus inquire whether employees of military bases were within the zone of interests meant to be protected by the Act. *See Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. ——, 111 S. Ct. 913, 918 (1991).

The legislative history of the Act demonstrates Congress' sensitivity to the impact of a base closing on the employees of the base and the community in which they live. Because of this sensitivity, Congress sought to ensure that the interest of the employees and their communities would be heard and that the process would be perceived by them as fair. To further this objective, Congress provided for opportunities for public hearings and comment. *See, e.g.*, §§ 2903(d)(1) and 2903(b). It also provided that, if the national interest is found to outweigh those of the local community, economic assistance would be provided to assist in the period of transition. § 2905(a)(B). Finally, because of this congressional

concern reflected in the Act and its legislative history, the base closing criteria established by the Secretary of Defense and left unaltered by the Congress include among the eight factors to be considered "the economic impact on communities." 56 Fed. Reg. 6374 (Feb. 15, 1991).

Given Congress' concern and the steps it took to assure consideration of the interests of employees and their communities, we readily conclude that individual Shipyard employees are within the zone of interest sought to be protected by the Act and that they have standing to press the issues raised in the complaint. We reach a similar conclusion with respect to the unions who are seeking to represent the interests of the members. *International Union, UAW v. Broch*, 477 U.S. 274 (1986).

III.

Section 702 of the Administrative Procedure Act ("APA") provides that any "person . . . aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." 5 U.S.C. § 702. The APA stipulates that the reviewing court will "set aside agency action . . . found to be . . . arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; . . . contrary to constitutional right . . . ; [or] without observance of the procedure required by law." 5 U.S.C. § 706(2). Review under the APA is available, however, only "to the extent that . . . statutes [do not] preclude judicial review" and the "agency action is [not] committed to agency discretion by law." 5 U.S.C. § 701(a).

The defendants insist that the district court had no authority under the APA to conduct a review of

the decision to close the Shipyard because the Act precludes judicial review. Litigants making such a contention have a very substantial burden to shoulder. As the Supreme Court stated in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1987) (emphasis added):

> We begin with the *strong presumption* that Congress intends judicial review of administrative action. From the beginning "our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." [citations omitted]. In *Marbury v. Madison*, 1 Cranch 136, 163, 5 U.S. 137, 163, 2 L. Ed. 60 (1803), a case itself involving review of executive action, Chief Justice Marshall insisted that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."
>
> * * * * *
>
> Committees of both Houses of Congress have endorsed this view. In undertaking the comprehensive rethinking of the place of administrative agencies in a regime of separate and divided powers that culminated in the passage of the [APA], the Senate Committee on the Judiciary remarked:
>
> "*Very rarely* do statutes withhold judicial review. It has *never* been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be *blank checks* drawn to the credit of some administrative officer or board." S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

Because "the very essence of civil liberty" is implicated, courts will presume the availability of judicial review unless there is "clear and convincing evidence of a contrary legislative intent." *Bowen*, 476 U.S. at 671, quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967). This "clear and convincing" standard is not meant in the strict evidentiary sense, but rather as "a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

The second category of agency action not subject to judicial review under the APA is that which is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This exception is, in essence, a subset of those cases where the statute passed by Congress precludes judicial review. That is, Congress in some instances evidences an intent that there be no judicial review by requiring an agency or official to make a decision in circumstances under which a reviewing court either would have no law to apply or would find itself confronted with judicially unmanageable issues. Because decisions "committed to agency discretion" are but one example of decisions with respect to which Congress has precluded judicial review, the strong presumption favoring such review applies here as well, and review is available unless it is clear that a reviewing court could not con-

duct a meaningful review. *See Davis Enter. v. United States Envtl. Protection Agency*, 877 F.2d 1181, 1185 (3d Cir. 1989) (presumption of reviewability exists in cases interpreting § 701(a)(2) of APA), *cert. denied*, 493 U.S. 1070 (1990).

The availability of judicial review under the APA is thus a matter of congressional intent [7] and we must address the reviewability of each of the issues raised by plaintiffs with that fact in mind. Before turning to that task, however, there is one further preliminary matter to be noted. The actions challenged here are not "agency actions" as usually encountered under the APA. The decisionmaking contemplated by the Act is a joint undertaking. The President, exercising the authority which he here exercised, could not close a base that the Commission had not recommended for closure. On the other hand, the Secretary and the Commission can only make recommendations under the Act. If the President fails to approve the Commission's recommendations, the closure process comes to an end for that year. § 2903(e)(5). While the statutory and constitutional violations alleged here result from actions or omissions of the Commissioner and the Secretary of Defense prior to the making of their recommendations, the alleged injury to the plaintiffs did not occur but for a decision of the President and it is from that decision that the plaintiffs necessarily seek relief; it is the implementation of the President's decision that we have been

[7] It is true, of course, that Congress may limit executive discretion only insofar as it acts within its constitutional grants of enumerated authority. *See* U.S. Const. art. I, § 8 (enumerating the chief powers granted to Congress). Neither party here, however, claims that Congress has acted beyond that authority in drafting the terms of the Act.

asked to enjoin. Thus, at least in one sense, we are here asked to review a presidential decision.

While the issue remains an open one in this Circuit, the APA may not be applicable to presidential decisionmaking. The Court of Appeals for the District of Columbia Circuit held in *Armstrong v. Bush*, 924 F.2d 282 (D.C. Cir. 1991) that the APA does not apply to the President. In *Armstrong*, the court reasoned that, while the APA defines "agency" as an "authority of the government," 5 U.S.C. §701(b)(1), Congress adopted this broad language to avoid a formalistic definition of the term and did not intend to subject the President to the APA's requirements. 924 F.2d at 289. The court also noted the longstanding practice of not requiring the President to abide by APA rulemaking procedures when issuing executive orders, and the rule that when Congress sets out to restrict presidential action, it must make its intentions clear. *Id.*

Even if the APA does not apply to decisions of the President, however, its provisions concerning judicial review represents a codification of the common law, 5 Kenneth C. Davis, *Administrative Law* § 28:4 (1984), *cited with approval in Heckler v. Cheney*, 470 U.S. 821, 832 (1985); *see also ICC v. Bhd. of Locomotive Eng's*, 482 U.S. 270, 282 (1987) (APA "codifies the nature and attributes of judicial review"), and actions of the President have never been considered immune from judicial review solely because they were taken by the President. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *see also INS v. Chadha*, 462 U.S. 919, 953 n. 16 (1983) ("[e]xecutive action under legis-

latively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review"); *Nixon v. Fitzgerald*, 457 U.S. 731, 781 (1982) (White, J., dissenting) ("it is the rule, not the exception, that executive actions—including those taken at the immediate direction of the President—are subject to judicial review"). As explained hereafter, we view the decisionmaking assigned to the President by the Act as clearly committed to his discretion and unreviewable. Congress's intent in this regard is sufficiently clear that our review would be the same whether or not the presumption favoring judicial review under the APA is applicable to presidential decisionmaking. It follows that our conclusions with respect to the availability of judicial review in this case will be the same whether or not the APA applies to presidential decisionmaking.

A.

We think it can be said with confidence that Congress intended no judicial review of decisions under the Act prior to the effective date of the President's decision, i.e., the first date upon which the Secretary can carry out any closure or realignment under § 2904(b). We say this for two reasons. First, the statutory scheme is inconsistent with there being judicial review prior to this point. The Act sets a very stringent timetable for the various stages of the process it establishes and Congress clearly intended that the final decision on base closing and realignment be reached with alacrity. The Secretary is required to submit his list of recommendations to the Commission by April 15th. § 2903(c). The Commis-

sion is then required to submit its final report to the President by July 1st, ten weeks later. § 2903(d). The President, in turn, is required to make his decision within two weeks, by July 15, 1991. § 2903(e). Finally, the Act allows Congress 45 days in which to disapprove the President's decision. § 2904(b). As the Supreme Court has repeatedly noted, judicial review while an administrative process is on-going is disruptive even where there is no requirement of expedition. *See, e.g., Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (premature judicial interference with agency processes may prevent agency from functioning efficiently). With a timetable like that established in the Act, the ability of the participants to meet their responsibilities would be seriously jeopardized if litigation were permitted to divert their attention. Second, Congress was undoubtedly aware of the rule that the courts may review agency action only if its impact upon plaintiffs is direct and immediate, *see Abbott Labs.*, 387 U.S. at 152. One can rarely if ever be injured by a base closing prior to a decision having been made to close that base. The actions of the Secretary and the Commission prior to the President's decisions are merely preliminary in nature. *See State of Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991) (holding that Congress intended to preclude judicial review of "preliminary decisionmaking activity").

B.

One can also say with confidence that Congress intended no judicial review of the manner in which the President has exercised his discretion in selecting bases for closure; indeed, plaintiffs do not argue

otherwise. Congress imposed no restrictions on the discretion of the Commander-in-Chief concerning the domestic deployment of the nation's military resources. The Act does not require of the President, as it does of the Secretary and Commission, that he accept the force structure plan and the base-closing criteria. *See* § 2903(e). If the President believes that the assessment of military need by the Secretary is understated or overstated, he can reject the recommendations for that reason. This leaves a court with no law to apply; i.e., the decision on which bases to close is committed by law to presidential discretion, and judicial review cannot be available. *Cf. Chicago and Southern Airlines v. Waterman S.S. Co.*, 333 U.S. 103 (1948) (under federal statute, applications to engage in foreign air transportation must be approved by President after recommendation by Civil Aeronautics Board; before Presidential approval, no pealable final result exists, and Presidential decision itself is not reviewable because it is committed to his discretion).

C.

This does not end the matter, however. As this court has repeatedly stressed, judicial review is foreclosed only "*to the extent that* statutes preclude" such review and only "*to the extent that* agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); *see, e.g., Kirby v. United States Govt. Dep't of Hous. and Urban Dev.*, 675 F.2d 60 (3d Cir. 1982); *Local 2855, AFGE v. United States*, 602 F.2d 574 (3d Cir. 1979). Thus, the fact that some aspects of a decisionmaking process are determined to be not subject to judicial review does not absolve the courts from the responsibility of determining whether a

clear congressional intention to preclude review exists with respect to other aspects of that same process. There are a number of statutes, for example, in which Congress has clearly intended that there be no review of the ultimate exercise of the agency's discretion, but, at the same time, has anticipated judicial review of compliance with its procedural mandates concerning the process leading up to the ultimate dicretionary decision. *See, e.g., Bowen*, 476 U.S. at 675-76 (Medicare statute explicitly limits review of benefit determinations, but challenges to method of determination are not so limited and therefore are reviewable); *Kirby*, 675 F.2d at 67-68 (under Housing Act of 1959, decision by Secretary of HUD to provide funding for housing project is unreviewable, but agency's compliance with procedures in Act is subject to review). Accordingly, we must conduct an issue-specific analysis with congressional intent as our loadstar.

In this context, it is important to note that while Congress did not intend courts to second-guess the Commander-in-Chief, it did intend to establish exclusive means for closure of domestic bases. § 2909(a). With two exceptions,[8] Congress intended that domes-

---

[8] The two other means by which bases may be closed are described in § 2909(c), which provides as follows, in relevant part:

> (c) *Exception.*—Nothing in this part affects the authority of the Secretary to carry out—
>
> (1) closures and realignments under title II of Public Law 100-526 [the 1988 Act]; and
>
> (2) closures and realignments . . . carried out for reasons of national security or a military emergency . . .

tic bases be closed *only* pursuant to an exercise of presidential discretion *informed by recommendations of the nation's military establishment and an independent commission based on a common and disclosed (1) appraisal of military need, (2) set of criteria for closing, and (3) data base.* Congress did not simply delegate this kind of decision to the President and leave to his judgment what advice and data he would solicit. Rather, it established a specific procedure that would ensure balanced and informed advice to be considered by the President and by Congress before the executive and legislative judgments were made. We must keep this congressional objective in mind as we inquire whether and to what extent Congress intended decisions of the Secretary and Commission to be reviewable when someone aggrieved by a base closing alleges that those decisions and the process underlying them deviated from this congressional model.

D.

The defendants' primary argument is that Congress intended to preclude all judicial review of the base closure process other than the limited and here irrelevant review[9] expressly authorized by the Act.

[9] The Act does provide for limited review under NEPA, after the closure decisions have been made. *See* § 2905(c)(2). Specifically, NEPA applies to actions of the Secretary during the process of property disposal and during the process of relocating functions from one installation to another. To the extent it applies, NEPA requires any federal agency considering a "a major federal action significantly affecting the quality of the human environment" to prepare an Environmental Impact Statement identifying the environmental consequences of the proposed action and recommends ways to

The defendants acknowledge that there is no express prohibition of judicial review under the Act. They correctly point out, however, that this does not end the inquiry. "Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block*, 467 U.S. at 345. Defendants contend that the purpose of the Act, its structure and its legislative history are inconsistent with the existence of any judicial review other than in the narrow area expressly authorized. We disagree. While the defendants have pointed to plausible reasons why Congress might have decided to dispense with all judicial review not expressly authorized, nothing in the statute or its legislative history provides a basis for concluding with confidence that it actually decided to do so.

As we shall see, there are some areas of decision-making under the Act in which Congress did not intend the courts to engage in second-guessing. Whether one classifies those areas as "committed to agency discretion" or simply as areas in which Congress intended to preclude judicial review makes no difference; either way one looks at it, the character and context of the decision required by the Act reflects a clear legislative intention that there be no judicial review. On the other hand, there are other

minimize those which are adverse. 42 U.S.C. § 4332(2)(c) (1988). Private parties may bring suit under the APA to challenge violations of NEPA's procedural requirements. *See Oregon Envtl. Council v. Kunzman*, 817 F.2d 484, 491-92 (9th Cir. 1987).

areas where our analysis leaves us with only the strong presumption favoring judicial review and no clear and convincing rebuttal. To hypothesize the paradigm case, if the Commission decided to dispense with public hearings in the interest of expedition, we could point to no clear and convincing evidence that Congress meant either to commit that decision to the Commission's discretion or otherwise to preclude judicial review of it.

Defendants purport to find a host of clear and convincing evidence of review preclusion in the Act and its legislative history. We will comment only on their three most plausible arguments: those pertaining to the timetable established by the Act, its express provision for limited NEPA review, and the cryptic legislative history concerning judicial review.

As we have noted, we agree with the proposition that the Act's timetable is inconsistent with judicial review prior to the final decision on which bases to close. However, we see little tension between that timetable and judicial review after a final list of bases for closure or realignment has been established. Judicial review at this stage will not interfere with the decisionmaking progress and holds no more potential for delay in implementing the final decision than exists in most of the broad range of situations in which Congress has countenanced judicial review. Moreover, the process for carrying out decisions to close and realign bases is complicated and time-consuming, *see* § 2905 (governing implementation of the approved list); bases are not closed or realigned overnight. The process of judicial review has proved sufficiently flexible to accommodate governmental actions involving far greater exigency. Finally, we

know from the legislative history that Congress was very sensitive to the impact that base closing and realignments have on the livelihood and security of millions of Americans and to the importance of public confidence in the integrity of the decisionmaking process. *See* H.R. Rep. No. 665, 101st Cong., 2d Sess. 385 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2931, 3078. In this context, accepting the brief delay occasioned by judicial review seems to us entirely consistent with the statutory scheme.

Defendants also contend that congressional intent to preclude judicial review, in particular review of procedural compliance with the Act, can be inferred from the Act's limitation of NEPA review. § 2905. Defendants point out that NEPA claims have been used to delay earlier base closure; they conclude that Congress expressed its intent to prevent procedural challenges in general by specifically excluding most of the new base closure process from compliance with NEPA. Plaintiffs look at the same facts and come to the opposite conclusion: By explicitly precluding only one kind of judicial review (NEPA), Congress intended all other kinds of review to be available. That two utterly inconsistent, yet plausible arguments may be fashioned from the same legislative expression is an example of why the Supreme Court has said, "[t]he existence of an express preclusion of judicial review in one section of a statute is a factor relevant to congressional intent, but it is not conclusive with respect to reviewability under other sections of the statute." *Morris v. Gressette*, 432 U.S. 491, 506 n.22 (1977). In short, we conclude that § 2905 (c) does not constitute clear evidence of congres-

sional intent with respect to all judicial review under the Act.[10]

Finally, the defendants argue that an intent to preclude judicial review is discernable from the legislative history of the Act. In particular, they point to a paragraph in the House Conference Report which addresses the question of judicial review:

> The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedures Act (5 U.S.C. 551 et seq.) contain explicit exemptions for "the conduct of military or foreign affairs functions." An action falling within this exception, as the decision to close and realign bases surely does, is immune from the provisions of the [APA] dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the [APA], no final agency action occurs in the case of various actions required under the base closure process contained in this

[10] Although they did not do so, defendants might have argued that by allowing a very limited class of NEPA claims (§ 2905(c)(2) declares that NEPA "shall apply to actions of the Department of Defense . . . during the process of property disposal, and . . . during the process of relocating") but nowhere else allowing for judicial review, Congress expressed its intent to preclude all other forms of review. But we find this argument, too, ultimately unpersuasive. The mere failure to specify the availability of most forms of judicial review is not enough to overcome the strong presumption that this review may be had. *See State of Illinois Dep't of Public Aid v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983) ([n]othing much can be inferred from the fact that Congress did not specify a method for judicial review . . . , even though earlier [in the statute] it had specified such a method).

> bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan under section 2903(a), the issuance of selection criteria under section 2803(b), [sic.] the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), [sic.] the decision of the President under section 2803(e), [sic.] and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

House Conference Report at 705, 1990 U.S.C.C.A.N. at 3258. The district court concluded that "[t]his passage . . . expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act." *Specter*, slip op. at 3. We disagree.

This passage is at best ambiguous. A fair reading reveals only an intent to preclude judicial review to the extent that there is not yet "final agency action" to review.[11] On its face, this paragraph does not

[11] The reference in this passage to the APA's military affairs exception is especially mystifying. This exception to the general rulemaking and adjudication provisions in Chapter 5 of the APA, 5 U.S.C. §§ 553 and 554, gives agencies involved in military decisions discretion to determine how much public participation, if any, will be available before a final rule is issued, and what evidence will be heard (and by whom) during an agency hearing. The military affairs exception does not, however, determine whether a certain agency action is final within the meaning of Chapter 7 of the APA, 5 U.S.C. § 701 *et seq.*, which governs judicial review.

claim that the Act itself forecloses any judicial review. Its only assertion is that the *APA* will preclude *some* judicial review and the only rationale given for the limited preclusions it contemplates under the APA is the absence of finality. The first three "specific actions" in the following list of illustrative actions that "would not be subject to judicial review" each lack finality and thus fit comfortably with the reading we find most plausible. The reference to the last two unreviewable "specific actions," the President's action on the Commission's recommendation and the Secretary's action in carrying out the ultimate decisions, concededly do not fit as well. At some point both of these types of actions become final. Nevertheless, to the extent the inclusion of reference to these actions is significant at all,[12] they do not provide us with clear evidence that Congress intended to preclude all judicial review not expressly authorized. If Congress anticipated that these particular actions would not be reviewable, it is far more reasonable to attribute this to the fact that both types of actions are clearly committed by the Act to the discretion of the decisionmaker.

Because we find no clear evidence of a congressional intent to preclude all judicial review other than the limited NEPA review, we reject defendants' primary argument.

We recognize that our conclusion that judicial review is not altogether precluded means that there

[12] The inclusion of the Secretary's action under § 2905 as "not . . . subject to judicial review" provides further support for the theory that this paragraph reflects little more than imprecise staff work. The Secretary's actions under § 2905 are the only actions under the Act that are expressly made subject to judicial review.

may be cases in which the challenged agency action will be found to fall short of or be inconsistent with the standards of the Act. We hasten to add that such a finding, if and when made, will not necessarily mandate judicial relief. Whether or not a violation receives a remedy is something that a court must determine through an exercise of discretion based on the character of the violation and all of the surrounding circumstances.[13] Thus, judicial review does not mean that any technical defalcation will invalidate the package and require that the process be repeated from square one.

E.

Having rejected the thesis that all judicial review is precluded, we now turn to the specific agency actions challenged by the plaintiffs and attempt to determine with respect to each allegation whether or not there is clear and convincing evidence of a congressional intent that there be no judicial review.

[13] Accordingly, it is unwise to speculate about the appropriate form of a remedy without knowing the character of and circumstances surrounding the violation. We do not agree, however, that affording judicial relief would necessarily frustrate Congress's intent to have presidential and congressional action only in the context of a "single package." As we shall see, any remedy afforded in this case would be limited to requiring further process in accordance with the provisions of the Act. Any such additional process could and should be afforded on an expedited basis. If the affording of that further process does not alter the recommendations of the Commission, reconsiderations by the President or Congress might be unnecessary. If that further process would alter the Commission's recommendations, reconsideration of the entire list of recommendations by the President and Congress in accordance with the limited timetable of the Act might be both feasible and appropriate.

Count I, it will be recalled, focuses on alleged deficiencies in the performances of the Secretaries of Navy and Defense.

The Secretary of Defense is required by the Act (a) to develop a force structure plan forecasting military need, (b) to identify criteria to be applied in determining which bases should and should not remain to meet that need, and (c) to formulate specific recommendations by applying that plan and those criteria to the current deployment of military resources throughout the country. § 2903(a)-(c). The Act makes no reference to the Secretary of the Navy and places no restrictions on the Secretary of Defense with respect to his sources of data or advice.

The plaintiffs challenge the decisionmaking process of the Secretary of Defense in fulfilling the above assignments. They allege, *inter alia*, that his force structure plan "lacked sufficient detail"; that his specific recommendations were based on inadequate data; and that he had "decided" to close the Shipyard before developing the criteria and manipulated the criteria so as to justify that result, in violation of § 2903(c)(3) (requiring Secretary to consider all domestic installations "equally without regard to whether [they had] previously been considered for closure"). In addition, plaintiffs allege that the Secretary of Defense relied on advice and data from the Secretary of the Navy that was inadequate, insufficiently explained, and inadequately documented.

We do not think Congress intended for the courts to review this kind of challenge to action under the Act. We say this primarily for two reasons. First, the Secretary's recommendations are clearly committed to his discretion under the Act. While those recommendations are required to be based on the

force structure plan and the base closing criteria and thus, in one sense, there are standards to be applied, the Secretary was assigned the task of formulating those standards because that task required military and other expertise.[14] So, too, do the tasks of applying those standards to the circumstances of each installation and of establishing priorities among them. Review of the Secretary's performance of these tasks

[14] The final criteria, for example, are reported in the Federal Register as follows:

> In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:
>
> *Military Value*
>
> 1. The current and future mission requirements and the impact on operational readiness of the Department of Defense's total force.
> 2. The availability and condition of land, facilities and associated airspace at both the existing and potential receiving locations.
> 3. The ability to accommodate contingency, mobilization, and future total force requirements at both the existing and potential receiving locations.
> 4. The cost and manpower implications.
>
> *Return on Investment*
>
> 5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.
>
> *Impacts*
>
> 6. The economic impact on communities.
> 7. The ability of both the existing and potential receiving communities' infrastructure to supoprt forces, missions and personnel.
> 8. The environmental impact.

56 Fed. Reg. 6344 (Feb. 15, 1991).

would necessarily present issues that simply are not "judicially manageable." In comparable circumstances, courts have concluded, based on the unmanageable nature of the issues that would be presented, that Congress anticipated no judicial review. *See Heckler*, 470 U.S. at 830 ("if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.' ").

In *National Federation of Federal Employees v. United States*, 905 F.2d 400, 405-406 (D.C. Cir. 1990) ("*NFFE*"), the Court of Appeals for the District of Columbia was asked to review the decisions of the Commission and the Secretary to close domestic military bases under the 1988 Base Closure Act, the predecessor of the 1990 Act which involved no presidential action. The court concluded that Congress intended no judicial review and we find ourselves in agreement with its reasoning:

> [T]he problem is not that the Act is devoid of criteria; . . . [the Act] sets forth nine specific criteria to be considered in making base closing decisions. Rather the rub is that the subject matter of those criteria is not "judicially manageable.". . . [J]udicial review of the decisions of the Secretary and the Commission would necessarily involve second-guessing the Secretary's assessment of the nation's military force structure and the military value of the bases within that structure. We think the federal judiciary is ill-equipped to conduct reviews of the nation's military policy. Such decisions are better left to those more expert in issues of defense.

The second, related ground for our conclusion that Congress contemplated no judicial review of these kinds of decisions, is Congress' provision of alternative methods of review. Congress anticipated that questions would be raised about the adequacy of the Secretary's data and analysis. It decided to put these questions to rest and guarantee the integrity of the process not through judicial review, but through review by two bodies far more suited to the task: the Commission, and the GAO. These two entities are charged with the assessment of the Secretary's application of the criteria and the force structure plan. Given the nature of this task, it seems clear to us that an additional review by the courts would not contribute to public confidence in this part of the process and accordingly, we doubt that Congress intended an additional level of review.

One further comment is in order in connection with this category of issues. Plaintiffs argue that it takes no military expertise to make a finding of historic fact as to whether the Secretary prejudged the relevant issue by deciding to close the Shipyard prior to establishing the criteria. We conclude that this is an oversimplification. When Congress called upon the Secretary to make recommendations, it was, of course, aware that he necessarily had given prior thought to the subject of base closures. It thus could not have considered prior thinking on the subject or even prior tentative decisionmaking to be a disqualifying fact. Surely, Congress intended nothing more of the Secretary than that he give meaningful, fresh consideration with respect to any issues previously visited. This is significant because judicial review of whether the Secretary has taken a meaningful fresh look necessarily presents the same kind of judicially

unmanageable issues as a review to determine the adequacy of the data utilized by the Secretary.

The Act also provides that the "Secretary shall make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission for closures." § 2903(c)(4). The Act thus appears to contemplate that the Commission and the GAO will have access to the Secretary's data base so that they can evaluate his recommendations. The plaintiffs, we think, charge that the Secretary failed to create and transmit to the Commission and the GAO an administrative record containing all of the information the Secretary relied upon in making his recommendations. If this is what the plaintiffs claim, we conclude that their claim is judicially reviewable. Judicial review of that claim presents the kind of issues with which courts have traditionally dealt and we perceive no other evidence of a congressional intent to preclude judicial review of that claim. Indeed, such a review seems entirely consistent with Congress' desire to assure the integrity of the decisionmaking processes. Accordingly, the presumption favoring judicial review must prevail with respect to this category of issues.

We admit to some confusion, however, as to whether the plaintiffs are complaining about the failure to transmit the data, or the adequacy of the data to support the recommendations. Based on the foregoing analysis, the former is reviewable by a court, the latter is not. Similar ambiguity can be found in several other of the claims here. For example, plaintiffs charge the Secretary with having failed to publish in the Federal Register as required by the Act "a summary of the selection process" and "a justification for each recommendation." Complaint at 48. If the point here is that there was no publication and the Act required it, this is clearly a reviewable claim. If the point is that the Act requires individual justification and there were none, this again is reviewable. On the other hand, if the point is that the justifications were unpersuasive or inadequately detailed, this is not a judicially reviewable allegation.

F.

Turning to Count II, the Act requires the Commission to apply the force structure plan and criteria to the current deployment of military forces and make an independent judgment about the Secretary's recommendations. The plaintiffs challenge the decisionmaking process by which the Commission fulfilled this assignment. They charge, for example, that the Commission failed to consider all of the Navy installations equally without regard to previous consideration for closure, that it failed to insist on adequate help from the GAO, that it accepted the recommendation of the Secretary with respect to the Shipyard even though the GAO had concluded that the Navy's decisionmaking was inadequately documented, that it (the Commission) utilized unpublished criteria, and that it failed to apply the published criteria equally to all installations.

We conclude that each of these challenges go to the merits of the recommendations of the Commission and that the merits of those recommendations, like the merits of the recommendations of the Secretary, are not subject to second guessing by the judiciary. We are again in agreement with the court in *NFFE* that the issues raised by a review of the Commis-

sion's recommendations are not judicially manageable ones. We note as well that under the Act the President and Congress review the Commission's recommendations, and both are better suited to the task than are the courts.

The Act does, however, require the Commission to hold public hearings, § 2903(d)(1), and the plaintiffs contend that the Commission failed to do so. Here again we are not certain we understand plaintiffs' argument, but if it is that the Act requires the Commission to base its decision solely on the Secretary's administrative record and the transcript of the public hearings, and that the Commission went beyond this record by holding closed-door meetings with the Navy, we believe their contention is judicially reviewable. In so holding, we do not decide that the Act does so require or that a remedy is available under the circumstances of this case even if it does.[15]

[15] Plaintiffs also argue that the Navy concealed all evidence favorable to the Shipyard and when the plaintiffs later obtained some of this information and called it to the Commission's attention, the Commission failed to reopen its public hearings to receive that information. This is said to violate § 2903(d)(1) which requires the Commission to hold hearings. If the argument is that § 2903(d)(1) required the Commission to receive all relevant information even that tendered after the close of a duly noticed hearing, judicial review of that claim seems to us entirely consistent with the congressional intent reflected in the Act and its legislative history. By so holding, we do not, of course, endorse the proposition that the Commission's failure to reopen its hearings was in conflict with § 2903(d)(1). Plaintiffs also appear to contend that the Navy's concealment of evidence favorable to the Shipyard violated § 2903(c)(4) of the Act which requires the Secretary of Defense to "make available to the Commission and the Comptroller General of the United States all information used by the Department in making its recommendations." If this claim is that the Secretary of Defense failed to forward information considered by him in formulating his recommendations, that claim is reviewable. On the other hand, if this claim is that, because of the Navy's concealment, the Secretary of Defense *failed* to consider evidence that he should have considered, judicial review is not available.

In sum, we conclude that the presumption favoring judicial review is rebutted with respect to a majority of plaintiffs' claims by the fact that the issues presented in such a review would be judicially unmanageable. Where the plaintiffs ask the court to substitute its political and military judgment for that of the Secretary and the Commission, their claims are not reviewable. The plaintiffs do, however, ask for judicial review of issues that the judiciary is entirely competent to address. With respect to those issues we find the presumption in favor of judicial review unrebutted by the other alleged indicia of congressional intent. While our analysis leaves the district court with a line drawing task, it should provide the guidance necessary for disposition of plaintiffs' numerous challenges.

IV.

As an alternative ground for its decision, the district court held that the political question doctrine prevented it from reviewing the actions of the Secretary and the Commission. Noting that the Act is a carefully wrought compromise which provides both the President and Congress with an opportunity to reject the Commission's recommendations, the court reasoned that this case is "one which [is] impossible for the court to resolve independently without expressing a lack of respect due the coordinate branches

of government." *Specter*, slip op. at 5, *alluding to language in Baker v. Carr*, 369 U.S. 186 (1962).

The Court in *Baker* described the elements that identify a nonjusticiable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.[16] More recently, in *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986), the Court explained that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." The Court also emphasized, however, that "one of the Judiciary's characteristic roles is to interpret statutes" and determine the obligations of the Executive under relevant statutes,

[16] The Court in *Baker* held that an equal protection challenge to the apportionment scheme of the Tennessee General Assembly did not present a nonjusticiable political question.

and "we cannot shirk this responsibility merely because our decision may have significant political overtones." *Id.*

The authorities cited above clearly demonstrate that, while it is not the role of the courts to disturb policy decisions of the political branches, the question of whether an agency has acted in accordance with a statute is appropriate for judicial review. In particular, we do not read those authorities as precluding judicial review of any of the kinds of issues we have previously identified as judicially reversible. If, for example, the statute requires that a decision of the Commission be based solely on the record transmitted by the Secretary and that produced during the public hearing, the political question doctrine, we conclude, would not bar review.

Defendants defend the district court's decision by pointing out that whichever of plaintiffs' claims one addresses, "the *relief* sought by [them] interferes directly with the policy decision to close the Shipyard and other installations." Brief for Appellees at 37. The fact that judicial review might undermine the Commission's policy choices, however, cannot by itself mean that review is not available. Judicial review of agency action almost always holds the potential to disrupt the agency's policy decisions. *Japan Whaling*, for example, involved a challenge to a decision by the Secretary of Commerce not to certify Japan under the Fishery Conservation and Management Act as acting to the detriment of an international whaling agreement. This certification, if made, would have forced the Secretary to repudiate an existing executive agreement with Japan allowing for a more gradual decrease in that country's commercial whaling. The Court, "cognizant of the interplay be-

tween [the statute] and the conduct of this Nation's foreign relations," nevertheless held the case to present a justiciable question of determining whether the Secretary had met his duty under the statute, "a recurring and acceptable task for the federal courts." 478 U.S. at 230.

Defendants also argue that "the lack of respect that gives rise to a political question is especially pronounced in this case because the Act assigns Congress, rather than the courts, the role of passing judgment on the base closure decision of the Executive branch." Brief for Appellees at 38. While we agree that the Act assigns this role to Congress and that this assignment is highly relevant to some of the judicial review issues posed by this case, we cannot agree that Congress's role under the Act precludes all judicial review. If congressional oversight were alone enough to create a nonjusticiable political question, the doctrine would grow to unmanageable dimensions: Congress "exercises oversight over all agencies, gets reports from many, and is often consulted by the executive branch before specific actions are taken." *Armstrong*, 924 F.2d at 292 (quotation omitted) (congressional oversight over agency action does not necessarily indicate intent to preclude judicial review).

Finally, defendants argue that there is "a textually demonstrable constitutional commitment" of the base closing issue "to a coordinate political department." *Baker*, 369 U.S. at 217. That is, decisions concerning military affairs are committed to the political branches under Articles I and II of the Constitution, and the ultimate issue here is the physical disposition of the nation's military forces. Brief for Appellees at

39-40. As plaintiffs point out, however, the fact that one facet of a decisionmaking process involves an exercise of discretion concerning military process affairs does not insulate all aspects of that process from judicial review. *Friends of the Earth v. U.S. Navy*, 841 F.2d 927 (9th Cir. 1988) (federal environmental statutes require Navy to obtain state permit before constructing port; Navy enjoined from construction until permit issued). The authorities cited by defendants are not to the contrary; in these cases, the courts were asked to involve themselves in matters well beyond judicial competence. *See Luftig v. McNamara*, 373 F.2d 664 (1967) (private in U.S. Army sought to have Vietnam War declared illegal and unconstitutional), *cert. denied*, 387 U.S. 945 (1967); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (in wake of shootings at Kent State, students sought judicial review and continuing surveillance over training, weaponry, and orders of National Guard).

V.

In Count III of the complaint, the union and Shipyard employee plaintiffs allege that the defendants' disregard of the Act constitutes a violation of their rights under the Fifth Amendment Due Process Clause. They assert "that they possess a property interest under the . . . Act in the Shipyard's continued operation unless and until it is determined, pursuant to a . . . process in accordance with the mandates of the . . . Act, that the Shipyard should be closed." Brief for Appellants at 40. In response, defendants argue that these plaintiffs have no cognizable "property interest" in the operation of the Shipyard.

It is well settled that protectable property interests can arise from a statutory scheme which creates legitimate claims of entitlement to particular benefits. *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972). Even where an intent to bestow a benefit on private individuals is clear, however, a statutory requirement that certain procedures be observed before a benefit can be withdrawn does not in itself create a protected property interest. *Olim v. Wakinekonka*, 461 U.S. 238, 249-51 (1983); *Stephany v. Wagner*, 835 F.2d 497, 500 (3d Cir. 1987), *cert. denied*, 487 U.S. 1207 (1988); *see also*, *Hill v. Group Three Housing Dev. Corp.*, 799 F.2d 385, 391 (8th Cir. 1986) (intent to benefit plaintiff not enough to create cognizable property interest). The mere fact that the Shipyard cannot be closed without meeting the requirements of the Act does not mean that Shipyard employees have a valid due process claim when those procedures are not observed. Rather, the dispositive question in deciding whether the statute creates a protectable property interest is whether it places substantive limits on official discretion for the benefit of shipyard workers. *Stephany*, 835 F.2d at 500, *quoting Olim*, 461 U.S. at 249. The statute must contain "explicitly mandatory language, i.e. specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow," in order to create a property interest. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463 (1989); Put another way, the complainant "must show that particularized standards or criteria guide the [government's] decisionmakers" in order to claim protection under the due process clause. *Olim*, 461 U.S. at 249 (quotation omitted).

While the Act establishes a specific process for closing military installations, it places no substantive limits on any of the decisionmakers. The Secretary is allowed to develop and publish criteria and a force structure plan, without specific guidance from the statute, and has broad discretion in applying those standards to current domestic deployment of military resources. The Commission also is accorded broad discretion in applying those standards and may accept the Secretary's recommendations even if they deviate substantially from the final criteria and force structure plan. *See* § 2903(d)(2)(B). Finally, the President and Congress, of course, may reject the Commission's recommendations for any reason at all. *See* §§ 2903(e), 2904(b).

In sum, the Act specifies a particular process but does not guarantee a particular outcome. As a result, the unions and the Shipyard employees can identify no legitimate claim to entitlement under the Act and Count III fails to state a due process claim upon which relief could be granted.

VI.

The judgment of the district court is reversed and this case is remanded to that court for further proceedings consistent with this opinion.

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I join parts I, II, IV, and V of the opinion of the court, but I disagree with the court's decision insofar as it holds that some of the challenged administrative actions are subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 and 702.

As the court notes (maj. typescript at 16-17), there is a "general presumption favoring judicial review of administrative action," but this presumption may be overcome by express statutory language, legislative history, or "inferences of intent drawn from the statutory scheme as a whole." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984). Assuming that this presumption applies in the present context,[1] I conclude that the legislative history and the statutory scheme, considered together, show that Congress meant to preclude review.[2]

I.

The legislative history must be viewed in light of the problems that Congress confronted when it enacted the Base Closure and Realignment Acts of 1988 and 1990. Congress undoubtedly recognized that objective and prompt decisions concerning base closings are vitally important, particularly at a time of budgetary problems and rapidly changing defense needs.[3] At the same time, Congress was acutely aware that for more than a decade before the passage of these laws, every attempt to close or realign a major base in this country had been blocked by Congress itself or by the courts.[4] The 1988 and 1990 Acts were devised to clear away the major obstacles that had produced this costly impasse.

One of the chief obstacles targeted by Congress was litigation that had obstructed base closing and realignment efforts. *See* H. Conf. Rep. No. 1071, 100th Cong., 2d Sess. 23 (1988) [hereinafter 1988 Conf. Rep.], *reprinted in* 1988 U.S. Code Cong. & Admin. News 3403. In 1977, Congress had enacted legislation requiring the Department of Defense to comply with various procedural requirements, including the preparation of an environmental impact statement under the National Environmental Policy Act of 1969 [hereinafter NEPA], before carrying out any major

[1] The defendants question whether this presumption applies because of the national security ramifications of base closing and realignment decisions.

[2] The majority states that "at least in one sense, we are here asked to review a presidential decision" (maj. typescript at 20). As I interpret the complaint and the plaintiffs' brief, however, they seek review, not of Presidential action, but of actions taken by the named defendants, i.e., the Secretary of Defense, the Secretary of the Navy, the Defense Base Closure and Realignment Commission, and its members. Accordingly, I see no need to decide whether actions of the President are reviewable under the APA or under administrative "common law."

Because the plaintiffs do not appear to seek review of Presidential action and because the defendants' actions would not have affected the plaintiffs if the President had not accepted the Commission's recommendations, it could be argued that the defendants' actions did not constitute "final agency action" under 5 U.S.C. § 704. I see no need to decide this question, however, because I conclude that the defendants' actions are not reviewable on other grounds.

[3] *See* Defense Base Closure and Realignment Commission, *Report to the President 1991* at v-vi [hereinafter *Commission Report*]; Hanlon, *Military Base Closings: A Study of Government by Commission*, 62 U. Colo. L. Rev. 331, 336, 358 (1991).

[4] *See, e.g., Base Closure: Joint Hearings on H.R. 1583 to Establish the Bipartisan Commission on the Consolidation of Military Bases Before the Military Installations and Facilities Subcommittee of the House Committee on Armed Services and Defense Policy Panel*, 100th Cong., 2d Sess. 349 (1988) (statement of Rep. Armey) [hereinafter *Joint Hearings*]; *Commission Report* at 1-4.

base closing or realignment. 10 U.S.C. § 2687(b)(1)-(3) (Supp. I 1977). In some instances, NEPA challenges had dragged on in the courts for years and had successfully blocked the closing of assertedly obsolete and unneeded bases. *See* 1988 Conf. Rep. at 23, 1988 U.S. Code Cong. & Admin. News at 3403. Both the 1988 and 1990 Acts dealt directly with this specific problem by generally prohibiting NEPA review.[5] While we are not concerned with NEPA review in this case, this experience is nevertheless instructive for present purposes. It demonstrates that Congress, anxious to remove the impediments that had effectively prevented base closings and realignments for more than a decade, was keenly aware how litigation concerning procedural requirements could be successfully used to stall and ultimately defeat base closing plans.

Unfortunately, while Congress expressly addressed the problem of NEPA review in the body of the 1988 and 1990 Acts, Congress did not confront the question of APA review in the same clear and direct manner. Instead, Congress relegated this question to discussion in the Conference Report. H.R. Conf. Rep. No. 101-923, 101st Cong., 2d Sess. 706 (1990) [hereinafter 1990 Conf. Rep.] *reprinted in* 1990 U.S. Code Cong. & Admin. News 3258. Moreover, the relevant passage in the Conference Report, which is set out in full in the court's opinion (majority typescript at 29), is not a model of clarity, as the majority points

[5] Base Closure and Realignment Act of 1988, Pub. L. No. 100-526 § 202(b), 208, 102 Stat. 2623, 2627 (1988) [hereinafter 1988 Act]; Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, § 2905(c)(1), 104 Stat. 1808-19 [hereinafter 1990 Act].

out (*id.* at 30-31). The passage in the report jumbles together several separate administrative law concepts —the military affairs exception to the APA's general rulemaking and adjudication provisions (5 U.S.C. §§ 553(a)(1), 554(a)(4)), the concept of final agency action (5 U.S.C. § 704), and the availability of judicial review (5 U.S.C. §§ 701(a), 702). No party in this case has been able to provide a fully satisfactory exegesis of this passage—nor can I. Still, I do not think that this passage, particularly when viewed in light of the background recounted above, can be wholly dismissed. The passage does state quite clearly that there would be no APA review of key decisions in the base closing and realignment process, including the President's decision to accept the Commission's package of recommendations and the Secretary of Defense's actions in implementing that package after the 45-day report-and-wait period. Because the issuance of the Commission's package is not included in this list, I agree with the majority that this passage alone is not enough to overcome the strong presumption in favor of judicial review. Nevertheless, I believe that this passage, despite its ambiguities, provides support for the proposition that Congress did not want APA review to interfere with its detailed base closing and realignment scheme.[6]

[6] *See also* [sic] Cong. Rec. H100143 (daily ed. Nov. 13, 1991) (in recommending certain amendments to the 1990 Act, the conferees on the 1991 amendments "reaffirm view, expressed in the [Conference Report on the 1990 Act] that actions taken under the Act . . . would not be subject to judicial review."); 137 Cong. Rec. S17411 (daily ed. Nov. 21, 1991) (statement of Sen. Nunn that the conferees' 1991 statement had the same meaning as the passage in the 1990 Conference Report).

II.

"[T]he inferences of intent drawn from [this] scheme" (*Block*, 467 U.S. at 349) point clearly toward the same conclusion. This innovative scheme was designed to obviate the institutional impediments that were thought to have contributed to the decade-long impasse regarding base closings and realignments. Under this scheme, an independent, bipartisan Defense Base Closure and Realignment Commission was created to formulate a package of recommended closings and realignments. 1990 Act § 2902. After receiving submissions from the Department of Defense, the Commission must draw up and send its package of recommendations to the President by July 1 of the year in question. *Id.* § 2903(a)-(d). Within a short time—by July 15—the President must choose between two options: (a) he may approve the entire package and transmit it to Congress or (b) he may disapprove the package in whole or in part and send it back to the Commission for reconsideration. *Id.* § 2903(e). If the President selects the first option and approves the package, Congress may disapprove the entire package by joint resolution within 45 days. *Id.* § 2904(b). If Congress fails to do so, all of the slated closings and realignments may be carried out. *Id.*

If the President selects the second option and sends the package of recommendations back to the Commission, the Commission must issue a revised package by August 15. *Id.* § 2903(c)(3). The President may then approve or disapprove the entire revised package. *Id.* § 2903(e)(4). If he approves, the package is sent to Congress, and the procedure just described is followed. If he disapproves, the process ceases. *Id.* § 2903(e)(5).

This scheme was designed to eliminate at least three obstacles that had thwarted past efforts to close bases. First, the scheme sought to prevent delaying tactics by setting short, inflexible time limits for action by the Commission, the President, and the Congress. The legislative history makes it abundantly clear that speed and finality were regarded as indispensable components of the new scheme. The House Conference Report stated that one of the main defects in the prior procedures was that "[c]losures and realignments [have] taken a considerable period of time and [have] involved numerous opportunities for challenges in court." 1990 Conf. Rep. at 705, 1990 U.S. Code Cong. & Admin. News 3257. The Report added that the new scheme was intended to expedite this process.[7] Representative Les Aspin, the chairman of the House Armed Services Committee and one of the sponsors of the 1988 Act,[8] reiterated the same point, stating that the new plan was intended to streamline current law on base closures to allow for expeditious closure of bases once the decision to close had been fully reached under the process." 137 Cong. Rec. H6007 (daily ed. July 31, 1991). Representa-

---

[7] The Report stated (1990 Conf. Rep. at 707, 1990 U.S. Code Cong. & Admin. News at 3257): "A new process involving an independent, outside commission will permit base closure to go forward in a prompt and rational manner. . . . The new procedures would considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignment."

[8] H.R. Rep. No. 100-1071, pt. I, 100th Cong., 2d Sess. 8 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3355, 3357.

tive Dick Armey, one of the architects of the new scheme,[9] stated on the House floor:

> [O]ne huge advantage to this base closing procedure is that it allows a base closing decision to be made with some finality. In the past, proposed base closings were often disputed for year[s] before a final verdict was rendered. That was the worst of all possible worlds. Even if the base was eventually saved from closure, the businesses around the base were greatly harmed by the persistent uncertainty.
>
> Under this procedure, however, all the communities affected [have] a chance to thoroughly make their case for their base. Now, this time of deliberation will come to an end and the decision will be made. At this point communities can roll up their sleeves, pull together, and find the best way to adjust to the base closure.

Id. at H6008.[10] On another occasion, Representative Armey wrote that "the supporters of obsolete bases . . . by enacting an array of environmental study mandates, advance notice requirements, and gratuitous red tape . . . have simply ground base closings to a halt." [11] He went on to explain that after a proposed closing is delayed for years by litigation "the local citizenry and members of Congress are thoroughly aroused, and the political pressures to cancel the clos-

---

[9] *Id.*

[10] *See also* Armey, *Base Maneuvers—The Games Congress Plays with the Military Pork Barrel, Joint Hearings* at 30, 35, *reprinted from from* Policy Review, Winter 1988, at 70, 75 [hereinafter *Base Maneuvers*].

[11] *Base Maneuvers* at 72.

ing order are all but insurmountable." [12] *See also Joint Hearings* at 19 (statement of Rep. Armey); 134 Cong. Rec. H16715 (daily ed. Apr. 13, 1988) (statement of Rep. Armey).

Second, the new scheme was designed to insulate base closing and realignment decisions from actual or apparent influence by partisan and other political considerations. In the past, Executive Branch recommendations had often been criticized and defeated on the ground that particular bases had been doomed or spared based on improper political factors. For example, Representative Armey said that prior base closing decisions had been "contaminated by unworthy political considerations" and that particular bases had been closed or retained in order to punish or reward members of Congress. 137 Cong. Rec. H6008 (daily ed. July 31, 1991).[13] Other members echoed these sentiments.[14] *See also Commission Report* at 1-1, 1-2.

---

[12] *Id.*

[13] *Joint Hearings*, at 20-21 (statement of Rep. Armey quoting past statement by Senators Bumpers and Heinz); *id.* at 17 (statement of Rep. Armey) ("To put is bluntly, there is a widespread fear in Congress that an Administration with unrestricted base closure power may use that power as a political weapon to intimidate Congress."); *id.* at 349 (statement of Rep. Armey) ("[T]here is a fear that an Administration may use the threat to close particularly military bases in order to influence the votes of members of Congress."). *See also* 1990 Conf. Rep. at 705, 1990 U.S. Code Cong. & Admin. News at 3257; H.R. Rep. 100-735 (II), 100th Cong., 2d Sess. 8-9, *reprinted in* 1988 U.S. Code Cong. & Admin. News at 3370, 3372 [hereinafter 1988 House Report pt. II].

[14] *See, e.g.*, 137 Cong. Rec. H6008 (daily ed. July 31, 1991) (statement of Rep. Weldon) ("I supported the base closing

The new scheme sought to remove any possible grounds for such charges by transferring the responsibility for recommending closings and realignments to an independent, nonpartisan body. Furthermore, the new scheme recognized that political considerations might creep back into the decisionmaking process if either the President or the Congress was permitted to add particular bases to or remove particular bases from the list formulated by the Commission. The new scheme therefore prohibited any such additions or deletions, restricting the President's and Congress's options to the acceptance or rejection of the Commission's entire list. The House Report on the 1990 Act explained that the "right way" to close bases is to use "a highly respected bipartisan commission [to] recommend bases for realignment

---

process in the legislation . . . because I wanted to remove [the] politics of the process of closing bases, and I think to a large extent we have done that from the standpoint of Republican versus Democratic politics"); *id.* at H6010 (statement of Rep. Snowe) ("This process was intended to remove the supposed evil of congressional politics from the base closure process"); *id.* at H6038 (statement of Rep. Fazio) ("Many serious and legitimate concerns were raised as to the political nature of the base closure recommendations when Secretary Cheney released his first list in January 1990. Because of these concerns, Congress included legislation as part of the fiscal year 1991 Defense authorization bill which put in place a clear, objective, and fair process for closing bases"). The legislative history of the 1988 Act reflected similar views. *See* 1988 House Report pt. II at 9, 1988 U.S. Code Cong. & Admin. News at 3372 ("[P]olitical pressure has thwarted attempts to effect savings and efficiencies by shutting down unneeded facilities, and the resulting belief that only by creating an expedited and automatic mechanism, insulated from the political pressures of the normal legislative process, will such savings be achieved.").

or closure based on a number of neutral and widely endorsed criteria" and to give Congress the opportunity to accept or reject the recommendations as a whole. H.R. Rep. No. 655, 101st Cong., 2d Sess. 341, *reprinted in* 1990 U.S. Code Cong. & Admin. News 2931, 3067. Likewise, the House Report on the 1988 Act explained: "[A] major concern underlying the 'Base Closure Commission' proposal is that political pressures in the Congress could block the closing of particular facilities. One important element of the Committee's procedure that is designed to allay that concern is the provision that the resolution may not be amended by the Congress." 1988 House Report pt. II at 9, 1988 U.S. Code Cong. & Admin. News at 3372.

Third, the new scheme apparently reflected the belief that Congress, although previously unable to agree on any major base closings, would find it easier to approve a package of recommended closings that had to be accepted or rejected in its entirety. Chairman Aspin repeatedly emphasized this point in public statements,[15] and his predictions proved accurate. While no major closing or alignment had been ac-

---

[15] *See* Morrison, *Caught Off Base*, 21 Nat'l J. 801, 801 (1989) (quoting Rep. Aspin); Mills, *Base Closings: The Political Pain Is Limited*, 46 Cong. Q. Weekly Rep. 3625 (1988) (quoting Rep. Aspin). *See also* 137 Cong. Rec. H6022 (daily ed. July 31, 1991) (statement of Rep. Holloway); Mills, *Challenge to Base Closings Fizzles on House Floor*, 47 Cong. Q. Weekly Rep. 2062 (1989); Mills, *Pain in Members' Home States Fails to Move Minds on Hill*, 47 Cong. Q. Weekly Rep. 604 (1989); Towell, *Hill Paves Way for Closing Old Base*, 46 Cong. Q. Weekly Rep. 2999 (1988) ("[B]y forcing Congress to deal with the proposal as a package, the new procedure [made] it harder for members to cut deals to protect individual bases in their home district against cutbacks.").

complished since the 1970s, the Commission's 1991 recommendations were approved by the President, and a proposed joint resolution of disapproval lost in the House by an overwhelming margin. 137 Cong. Rec. H6006 (daily ed. July 30, 1991).

III.

In my view, judicial review of base closing decisions is inconsistent with this scheme because a successful challenge—i.e., one that at least temporarily invalidates a base closing decision—would thwart the scheme's fundamental objectives.

First, it seems clear that judicial review would undermine the concepts of speed and finality that Congress regarded as vital parts of its plan. *See Morris v. Gressette*, 432 U.S. 491, 503-04 (1977). In the vast majority of cases, judicial review could not be completed within the short time limits imposed by the Act. The majority acknowledges (maj. typescript at 17) that "the Act's timetable is inconsistent with judicial review prior to the final decision on which bases to close," but the majority "sees little tension between that timetable and judicial review after a final list of bases for closure" has been approved by the President and not disapproved by the Congress.

I disagree. The new scheme crafted by Congress contemplates that a truly "final" decision on a package of closings and realignments would be completed within the short time periods set out.[16] The scheme

[16] In providing for very limited NEPA review—of property disposal and relocation actions to be taken after a final closing or alignment decision (1990 Act § 2905(c)(2))—Congress imposed a very short (60-day) statute of limitations. No

did not contemplate that this "final" decision would then be subject to judicial review, possible reversal, and further action by the Commission, the President, and the Congress.

Furthermore, judicial review of one part of a purportedly "final" package will often implicate other parts of the package. Decisions regarding base closings sometimes involve hard choices concerning the relative merits of comparable bases. (In this case, for example, a major theme in the plaintiffs' complaint is the Philadelphia Naval Yard's claimed superiority over other similar naval yards that the Commission evaluated more highly and therefore recommended be retained.) Thus, if the Commission decides to recommend closure of [sic] base A rather than Base B and the decision on Base A is reversed after judicial review of the Commission's procedures, the decision to recommend retention of Base B will logically be called into question. In this way, judicial review of one part of the "final" package may reopen other parts of the package as well—or require the taxpayers to pay for clearly redundant facilities.

Not only would judicial review after a purportedly "final" decision upset the timetable set out in the Act, but such review would undermine the concept that neither the President nor Congress should be permitted to approve or disapprove the closing of a particular base but should instead be restricted to choosing between acceptance or rejection of the Commission's entire package. If the plaintiffs in this case succeed on their underlying APA claims and the

statute of limitations was prescribed for a suit of the type as issue here. This seems a clear indication that no such suits were contemplated.

Commission is required to conduct further proceedings and issue a new recommendation regarding the Philadelphia Naval Yard, the President and the Congress would then be placed in precisely the situation that the new scheme was designed to avoid—deciding whether to close or spare a single base.

In sum, it seems to me that the statutory scheme is grounded on concepts—speed, finality, and limiting the President and the Congress to an all-or-nothing choice on a package or recommendations—that are inconsistent with judicial review under the APA. Certainly I do not suggest that review of the decision regarding the Philadelphia Naval Yard will bring the statutory scheme tumbling down, and I am unable to predict what effect if any the precedent set by this case will have on litigation concerning future attempted closings. I conclude only that judicial review of base closing and realignment decisions is conceptually inconsistent with the innovative scheme enacted by Congress. This analysis, reinforced by the legislative history, leads me to the conclusion that base closing decisions are not reviewable under the APA.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. 92-485

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above Court in this cause is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Franklin* v. *Massachusetts*, 505 U.S. —— (1992).

November 9, 1992

SUPREME COURT OF THE UNITED STATES

No. 92-485

SEAN O'KEEFE, ACTING SECRETARY OF THE NAVY, ET AL., PETITIONERS

v.

ARLEN SPECTER, ET AL.

ORDER ALLOWING CERTIORARI

Filed November 9, 1992

The petition herein for writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 91-4322

SEN. ARLEN SPECTER, ET AL.

v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY, ET AL.

[Filed November 1, 1991]

MEMORANDUM AND ORDER

BUCKWALTER, J.

I will grant the defendants' motion to dismiss because:

(a) the statute precludes judicial review; and
(b) the political question doctrine forecloses judicial intervention.

A. *THE STATUTE PRECLUDES JUDICIAL REVIEW*

Plaintiffs have asserted that their right to judicial review for Counts I and II arises under the Adminis-

trative Procedure Act, 5 U.S.C. §§ 551-706 (1977), hereafter APA.

The presumption of judicial review of federal agency action under the APA is well established. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). This presumption, like all presumptions used in interpreting statutes, may be overcome by the appropriate showing of congressional intent. *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984). The APA specifically provides two methods for overcoming the presumption of judicial review in § 701(a). For purposes of this case, we are concerned only with the first method in § 701(a)(1), which provides for no judicial review under the APA "to the extent that—(1) statutes preclude judicial review . . ." 5 U.S.C. §§ 701(a)(1) (1977).

In determining whether a statute precludes judicial review, the Supreme Court has instructed courts to look at "specific language or specific legislative history that is a reliable indicator of congressional intent," "the collective import of legislative and judicial history behind a particular statute," and "inferences of intent drawn from the statutory scheme as a whole." *Block*, 467 U.S. at 349. As long as the congressional intent to preclude judicial review is "fairly discernible in the statutory scheme," the presumption favoring judicial review has been overcome. *Id.* at 351.

Applying these standards, the court finds that the Defense Base Closure and Realignment Act of 1990 precludes judicial review for the following reasons. Initially, specific language in the legislative history of the Act indictates a congressional intent to preclude judicial review. The House Conference Report provides:

> The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedures Act (5 U.S.C. 551 et seq.) contain explicit exemptions for "the conduct of military or foreign affairs function." An action falling within this exception, as the decision to clear and realign bases surely does, is immune from the provisions of the Administrative Procedures Act dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the Administrative Procedure Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions, therefore, would not be subject to the rulemaking and adjudication requirements, and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan . . . , the issuance of selection criteria . . . , the Secretary of Defense's recommendation of closures and realignments of military installations . . . , the decision of the President . . . , and the Secretary's actions to carry out the recommendations of the Commission. . . .

H.R. Conf. Rep. 101-923, 101st Cong., 2d Sess. 706, *reprinted in* 1990 U.S. Code Cong. & Admin. News 3110, 3258.

This passage in the legislative history expresses a clear congressional intent to preclude judicial review under the APA of all actions taken pursuant to the Base Closure Act.

Other indicia of statutory intent to preclude judicial review is the Act's concern with "the timely

closure and realignment of military installations." Section 2901(b). The House Conference Report stated a desire for the base closure process under the 1990 Act to correct the failings of the base closure process under the then existing law, which included that closures and realignments "take a considerable period of time and involve numerous opportunities for challenge in court." H.R. Conf. Rep. 101-923, 101st Cong. 2d Sess. 705, reprinted in 1990 U.S. Code Cong. & Admin. News 3110, 3257. The Report further stated that the new process under the 1990 Act "involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner." *Id.*

This language in the legislative history indicates that there was concern that judicial review of base closures had been preventing the base closure process from moving forward in a timely manner. The desire to correct this shortcoming under the then existing law further supports the contention that no judicial review was contemplated by the 1990 Act. While the arguments proposed by both sides on this issue are extensive, I have written this memorandum in a rather summary fashion in the interest of time, but not at the expense of a thorough analysis of the arguments on both sides. In brief, I find that the intent to preclude judicial review is "fairly discernible in the statutory scheme."

B. *THE POLITICAL QUESTION DOCTRINE FORECLOSES JUDICIAL INTERVENTION*

"Our discussion, even at the price of extending this opinion, requires review of a number of political question cases, in order to expose the attributes of the doctrine—attributes which, in various settings, di-

verge, combine, appear and disappear in seemingly disorderliness". *Baker v. Carr*, 369 U.S. 186, 210 (1962).

Based on my own review of cases as well as treatises on the subject, I believe that Justice Brennan's statement in the *Baker* case, *supra*, remains as true today as it was 29 years ago. Nevertheless, the *Baker* case did describe the attributes of a political question and expressed them in the following manner:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

In a sense, the invoking of the political question doctrine is no more than a correlative of my first

conclusion that the Defense Base Closure and Realignment Act of 1990 precludes judicial review.

On the other hand, the doctrine can stand by itself, it seems to me, as one which recognizes that in certain cases, the concept of separation of powers strongly suggests that the judiciary should defer in certain controversies to one or both of the other branches of government.

In reviewing the formulations in *Baker*, I felt that the present case represented one which was impossible for the court to resolve independently without expressing lack of respect due the coordinate branches of government.

The respect due to the other branches of government comes in part from a recognition that all branches are deeply concerned with conducting their affairs in the manner which is consistent with the constitution. Indeed, all three branches are involved in interpreting it. It is true, of course, that normally the judicial branch undertakes the ultimate review of laws and in so doing will not always agree with the interpretation of the other branches.

Under the political question doctrine, when should the judiciary defer to the other branches' views as opposed to simply undertaking judicial review and stating its own views, whether or not they differ from the other branches?

Unfortunately, there is no particular guidance in case law for determining the answer to that question as the first quotation from *Baker* indicates. The simple answer is, RARELY. Nevertheless, one must view the particular setting in which the question is raised. The case now before me comes with a significantly long history of attempts to close military

bases and the problems resulting from such attempts. The Act of 1990 is the most recent in a series of efforts by Congress to resolve those problems fairly. Among other things, it provides for a review by Congress of the recommendations of the Commission, thereby giving members of Congress the opportunity to dispute those recommendations. As permitted by the Act, both the President and the Congress have approved the recommended base closures. While plaintiffs view defendants' raising of the political question doctrine as specious, I must disagree. Although I view it as a doctrine which should be used sparingly, this case fairly calls for its invocation.

In conclusion, I believe that it would be impossible to undertake judicial review of the decision on base closures made by the duly elected representatives of this country without expressing a lack of the respect due those branches of government.

Based on the foregoing opinion, the folllowing order is entered:

ORDER

AND NOW, this 1st day of November, 1991, it is hereby ORDERED that defendants' Motion to Dismiss is GRANTED; the court enters judgment for the defendants and the plaintiffs' claims are DISMISSED WITH PREJUDICE.

BY THE COURT:

/s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN. HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, Secretary of the Navy; RICHARD CHENEY, Secretary of Defense; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.,

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG, GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE, THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN, U.S. REP. PETER H. KOSTMAYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON, THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Hutchinson, Judge Nygaard, and Judge Alito would have granted rehearing in banc.

By the Court

/s/ WALTER STAPLETON
Circuit Judge

Dated: June 14, 1993

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1932

SEN. ARLEN SPECTER; SEN HARRIS WOFFORD; SEN. BILL BRADLEY; SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY; COMMONWEALTH OF PENNSYLVANIA; ERNEST D. PREATE, JR., PENNSYLVANIA ATTORNEY GENERAL; REP. CURT WELDON, REP. THOMAS FOGLIETTA; REP. ROBERT ANDREWS; REP. R. LAWRENCE COUGHLIN; CITY OF PHILADELPHIA; HOWARD J. LANDRY; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL; METAL TRADES COUNCIL, LOCAL 687 MACHINISTS; GOVERNOR JAMES J. FLORIO; STATE OF NEW JERSEY; ROBERT J. DEL TUFO, NEW JERSEY ATTORNEY GENERAL; GOVERNOR MICHAEL N. CASTLE; STATE OF DELAWARE; REP. PETER H. KOSTMEYER; REP. ROBERT A. BORSKI, RONALD WARRINGTON; PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION LOCAL NO. 2

v.

H. LAWRENCE GARRETT, III, SECRETARY OF THE NAVY; RICHARD CHENEY, SECRETATY OF DEFENSE; THE DEFENSE BASE CLOSURE AND REALIGNMENT COMMISSION, AND ITS MEMBERS; JAMES A. COURTER; WILLIAM L. BALL, III; HOWARD H. CALLAWAY; DUANE H. CASSIDY; ARTHUR LEVITT, JR.; JAMES C. SMITH, II; ROBERT D. STUART, JR.

U.S. SEN. ARLEN SPECTER, U.S. SEN. HARRIS WOFFORD, U.S. SEN. BILL BRADLEY, U.S. SEN. FRANK R. LAUTENBERG; GOVERNOR ROBERT P. CASEY, THE COMMONWEALTH OF PENNSYLVANIA; PENNSYLVANIA ATTORNEY GENERAL ERNEST D. PREATE, JR., GOVERNOR JAMES J. FLORIO, THE STATE OF NEW JERSEY, NEW JERSEY ATTORNEY GENERAL ROBERT J. DEL TUFO, GOVERNOR MICHAEL N. CASTLE; THE STATE OF DELAWARE, U.S. REP. CURT WELDON, U.S. REP. THOMAS FOGLIETTA, U.S. REP. ROBERT E. ANDREWS, U.S. REP. R. LAWRENCE COUGHLIN; U.S. REP. PETER H. KOSTMEYER, U.S. REP. ROBERT A. BORSKI, THE CITY OF PHILADELPHIA, HOWARD J. LANDRY, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 3, WILLIAM F. REIL, METALS TRADES COUNCIL, LOCAL 687, MACHINISTS, RONALD WARRINGTON; THE PLANNERS ESTIMATORS PROGRESSMAN & SCHEDULERS UNION, LOCAL NO. 2, APPELLANTS

SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALITO, *Circuit Judges*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Alito would have granted rehearing.

By the Court,

/s/ WALTER K. STAPLETON
Circuit Judge

Dated: May 20, 1992

APPENDIX G

Defense Base Closure and Realignment Act of 1990, Pub. L. No. 101-510, 104 Stat. 1808, as amended;* 10 U.S.C. 2687 note (Supp. IV 1992).

"SEC. 2901. SHORT TITLE AND PURPOSE

"(a) SHORT TITLE.—This part may be cited as the 'Defense Base Closure and Realignment Act of 1990'.

"(b) PURPOSE.—The purpose of this part is to provide a fair process that will result in the timely closure and realignment of military installations inside the United States.

"SEC. 2902. THE COMMISSION

"(a) ESTABLISHMENT.—There is established an independent commission to be known as the 'Defense Base Closure and Realignment Commission'.

"(b) DUTIES.—The Commission shall carry out the duties specified for it in this part.

"(c) APPOINTMENT.—(1)(A) The Commission shall be composed of eight members appointed by the President, by and with the advise and consent of the Senate.

"(B) The President shall transmit to the Senate the nominations for appointment to the Commission—

---

* See National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, Tit. III, § 344(b)(1), Tit. XXVIII, §§ 2821, 2827(a), 105 Stat. 1344-1345, 1544-1546, 1551; National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Tit. X, § 1054(b), Tit. XXVIII, § 2821(b), 106 Stat. 2502, 2607-2608.

"(i) by no later than January 3, 1991, in the case of members of the Commission whose terms will expire at the end of the first session of the 102nd Congress;

"(ii) by no later than January 25, 1993, in the case of members of the Commission whose terms will expire at the end of the first session of the 103rd Congress; and

"(iii) by no later than January 3, 1995, in the case of members of the Commission whose terms will expire at the end of the first session of the 104th Congress.

"(C) If the President does not transmit to Congress the nominations for appointment to the Commission on or before the date specified for 1993 in clause (ii) of subparagraph (B) or for 1995 in clause (iii) of such subparagraph, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

"(2) In selecting individuals for nominations for appointments to the Commission, the President should consult with—

"(A) the Speaker of the House of Representatives concerning the appointment of two members;

"(B) the majority leader of the Senate concerning the appointment of two members;

"(C) the minority leader of the House of Representatives concerning the appointment of one member; and

"(D) the minority leader of the Senate concerning the appointment of one member.

"(3) At the time the President nominates individuals for appointment to the Commission for each session of Congress referred to in paragraph (1)(B), the President shall designate one such individual who shall serve as Chairman of the Commission.

"(d) TERMS.—(1) Except as provided in paragraph (2), each member of the Commission shall serve until the adjournment of Congress sine die for the session during which the member was appointed to the Commission.

"(2) The Chairman of the Commission shall serve until the confirmation of a successor.

"(e) MEETINGS.—(1) The Commission shall meet only during calendar years 1991, 1993, and 1995.

"(2)(A) Each meeting of the Commission, other than meetings in which classified information is to be discussed, shall be open to the public.

"(B) All the proceedings, information, and deliberations of the Commission shall be open, upon request, to the following:

"(i) The Chairman and the ranking minority party member of the Subcommittee on Readiness, Sustainability, and Support of the Committee on Armed Services of the Senate, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

"(ii) The Chairman and the ranking minority party member of the Subcommittee on Military Installations and Facilities of the Committee on Armed Services of the House of Representatives, or such other members of the Subcommittee designated by such Chairman or ranking minority party member.

"(iii) The Chairmen and ranking minority party members of the Subcommittees on Military Construction of the Committees on Appropriations of the Senate and of the House of Representatives, or such other members of the Subcommittees designated by such Chairmen or ranking minority party members.

"(f) VACANCIES.—A vacancy in the Commission shall be filled in the same manner as the original appointment, but the individual appointed to fill the vacancy shall serve only for the unexpired portion of the term for which the individual's predecessor was appointed.

"(g) PAY AND TRAVEL EXPENSES.—(1)(A) Each member, other than the Chairman, shall be paid at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties vested in the Commission.

"(B) The Chairman shall be paid for each day referred to in subparagraph (A) at a rate equal to the daily equivalent of the minimum annual rate of basic pay payable for level III of the Executive Schedule under section 5314 of title 5, United States Code.

"(2) Members shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5, United States Code.

"(h) DIRECTOR OF STAFF.—(1) the Commission shall, without regard to section 5311(b) of title 5, United States Code, appoint a Director who has not

served on active duty in the Armed Forces or as a civilian employee of the Department of Defense during the one-year period preceding the date of such appointment.

"(2) The Director shall be paid at the rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5, United States Code.

"(i) STAFF.—(1) Subject to paragraphs (2) and (3), the Director, with the approval of the Commission, may appoint and fix the pay of additional personnel.

"(2) The Director may make such appointments without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and any personnel so appointed may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of that title relating to classification and General Schedule pay rates, except that an individual so appointed may not receive pay in excess of the annual rate of basic pay payable for GS-18 of the General Schedule.

"(3)(A) Not more than one-third of the personnel employed by or detailed to the Commission may be on detail from the Department of Defense.

"(B)(i) Not more than one-fifth of the professional analysts of the Commission staff may be persons detailed from the Department of Defense to the Commission.

"(ii) No person detailed from the Department of Defense to the Commission may be assigned as the lead professional analyst with respect to a military department or defense agency.

"(C) A person may not be detailed from the Department of Defense to the Commission if, within 12 months before the detail is to begin, that person par-

ticipated personally and substantially in any matter within the Department of Defense concerning the preparation of recommendations for closures or realignments of military installations.

"(D) No member of the Armed Forces, and no officer or employee of the Department of Defense, may—

"(i) prepare any report concerning the effectiveness, fitness, or efficiency of the performance on the staff of the Commission of any person detailed from the Department of Defense to that staff;

"(ii) review the preparation of such a report; or

"(iii) approve or disapprove such a report.

"(4) Upon request of the Director, the head of any Federal department or agency may detail any of the personnel of that department or agency to the Commission to assist the Commission in carrying out its duties under this part.

"(5) The Comptroller General of the United States shall provide assistance, including the detailing of employees, to the Commission in accordance with an agreement entered into with the Commission.

"(6) The following restrictions relating to the personnel of the Commission shall apply during 1992 and 1994:

"(A) There may not be more than 15 persons on the staff at any one time.

"(B) The staff may perform only such functions as are necessary to prepare for the transition to new membership on the Commission in the following year.

"(C) No member of the Armed Forces and no employee of the Department of Defense may serve on the staff.

"(j) OTHER AUTHORITY.—(1) The Commission may procure by contract, to the extent funds are available, the temporary or intermittent services of experts or consultants pursuant to section 3109 of title 5, United States Code.

"(2) The Commission may lease space and acquire personal property to the extent funds are available.

"(k) FUNDING.—(1) There are authorized to be appropriated to the Commission such funds as are necessary to carry out its duties under this part. Such funds shall remain available until expended.

"(2) If no funds are appropriated to the Commission by the end of the second session of the 101st Congress, the Secretary of Defense may transfer, for fiscal year 1991, to the Commission funds from the Department of Defense Base Closure Account established by section 207 of Public Law 100-526 [set out below]. Such funds shall remain available until expended.

"(*l*) TERMINATION.—The Commission shall terminate on December 31, 1995.

"(m) PROHIBITION AGAINST RESTRICTING COMMUNICATIONS.—Section 1034 of title 10, United States Code, shall apply with respect to communications with the Commission.

"SEC. 2903. PROCEDURE FOR MAKING RECOMMENDATIONS FOR BASE CLOSURES AND REALIGNMENTS

"(a) FORCE-STRUCTURE PLAN.—(1) As part of the budget justification documents submitted to Congress in support of the budget for the Department

of Defense for each of the fiscal years 1992, 1994, and 1996, the Secretary shall include a force-structure plan for the Armed Forces based on an assessment by the Secretary of the probable threats to the national security during the six-year period beginning with the fiscal year for which the budget request is made and of the anticipated levels of funding that will be available for national defense purposes during such period.

"(2) Such plan shall include, without any reference (directly or indirectly) to military installations inside the United States that may be closed or realigned under such plan—

"(A) a description of the assessment referred to in paragraph (1);

"(B) a description (i) of the anticipated force structure during and at the end of each such period for each military department (with specifications of the number and type of units in the active and reserve forces of each such department), and (ii) of the units that will need to be forward based, with a justification thereof) during and at the end of each such period; and

"(C) a description of the anticipated implementation of such force-structure plan.

"(3) The Secretary shall also transmit a copy of each such force-structure plan to the Commission.

"(b) SELECTION CRITERIA.—(1) The Secretary shall, by no later than December 31, 1990, publish in the Federal Register and transmit to the congressional defense committees the criteria proposed to be used by the Department of Defense in making recommendations for the closure or realignment of military

installations inside the United States under this part. The Secretary shall provide an opportunity for public comment on the proposed criteria for a period of at least 30 days and shall include notice of that oppportunity in the publication required under the preceding sentence.

"(2)(A) The Secretary shall, by no later than February 15, 1991, publish in the Federal Register and transmit to the congressional defense committees the final criteria to be used in making recommendations for the closure or realignment of military installations inside the United States under this part. Except as provided in subparagraph (B), such criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before March 15, 1991.

"(B) The Secretary may amend such criteria, but such amendments may not become effective until they have been published in the Federal Register, opened to public comment for at least 30 days, and then transmitted to the congressional defense committees in final form by no later than January 15 of the year concerned. Such amended criteria shall be the final criteria to be used, along with the force-structure plan referred to in subsection (a), in making such recommendations unless disapproved by a joint resolution of Congress enacted on or before February 15 of the year concerned.

"(c) DOD RECOMMENDATIONS.—(1) The Secretary may, by no later than April 15, 1991, March 15, 1993, and March 15, 1995, publish in the Federal Register and transmit to the congressional defense committees and to the Commission a list of the military installa-

tions inside the United States that the Secretary recommends for closure or realignment on the basis of the force-structure plan and the final criteria referred to in subsection (b)(2) that are applicable to the year concerned.

"(2) The Secretary shall include, with the list of recommendations published and transmitted pursuant to paragraph (1), a summary of the selection process that resulted in the recommendation for each installation, including a justification for each recommendation.

"(3) In considering military installations for closure or realignment, the Secretary shall consider all military installations inside the United States equally without regard to whether the installation has been previously considered or proposed for closure or realignment by the Department.

"(4) In addition to making all information used by the Secretary to prepare the recommendations under this subsection available to Congress (including any committee or member of Congress), the Secretary shall also make such information available to the Commission and the Comptroller General of the United States.

"(5)(A) Each person referred to in subparagraph (B), when submitting information to the Secretary of Defense or the Commission concerning the closure or realignment of a military installation, shall certify that such information is accurate and complete to the best of that person's knowledge and belief.

"(B) Subparagraph (A) applies to the following persons:

"(i) The Secretaries of the military departments.

"(ii) The heads of the Defense Agencies.

"(iii) Each person who is in a position the duties of which include personal and substantial involvement in the preparation and submission of information and recommendations concerning the closure or realignment of military installations, as designated in regulations which the Secretary of Defense shall prescribe, regulations which the Secretary of each military department shall prescribe for personnel within that military department, or regulations which the head of each Defense Agency shall prescribe for personnel within that Defense Agency.

"(6) In the case of any information provided to the Commission by a person described in paragraph (5)(B), the Commission shall submit that information to the Senate and the House of Representatives to be made available to the Members of the House concerned in accordance with the rules of that House. The information shall be submitted to the Senate and the House of Representatives within 24 hours after the submission of the information to the Commission. The Secretary of Defense shall prescribe regulations to ensure the compliance of the Commission with this paragraph.

"(d) REVIEW AND RECOMMENDATIONS BY THE COMMISSION.—(1) After receiving the recommendations from the Secretary pursuant to subsection (c) for any year, the Commission shall conduct public hearings on the recommendations.

"(2)(A) The Commission shall, by no later than July 1 of each year in which the Secretary transmits recommendations to it pursuant to subsection (c), transmit to the President a report containing the

Commission's findings and conclusions based on a review and analysis of the recommendations made by the Secretary, together with the Commission's recommendations for closures and realignments of military installations inside the United States.

"(B) Subject to subparagraph (C), in making its recommendations, the Commission may make changes in any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially from the force-structure plan and final criteria referred to in subsection (c)(1) in making recommendations.

"(C) In the case of a change described in subparagraph (D) in the recommendations made by the Secretary, the Commission may make the changes only if the Commission—

"(i) makes the determination required by subparagraph (B);

"(ii) determines that the change is consistent with the force-structure plan and final criteria referred to in subsection (c)(1);

"(iii) publishes a notice of the proposed change in the Federal Register not less than 30 days before transmitting its recommendations to the President pursuant to paragraph (2); and

"(iv) conducts public hearings on the proposed change.

"(D) Subparagraph (C) shall apply to a change by the Commission in the Secretary's recommendations that would—

"(i) add a military installation to the list of military installations recommended by the Secretary for closure;

"(ii) add a military installation to the list of military installations recommended by the Secretary for realignment; or

"(iii) increase the extent of a realignment of a particular military installation recommended by the Secretary.

"(3) The Commission shall explain and justify in its report submitted to the President pursuant to paragraph (2) any recommendation made by the Commission that is different from the recommendations made by the Secretary pursuant to subsection (c). The Commission shall transmit a copy of such report to the congressional defense committees on the same date on which it transmits its recommendations to the President under paragraph (2).

"(4) After July 1 of each year in which the Commission transmits recommendations to the President under this subsection, the Commission shall promptly provide, upon request, to any Member of Congress information used by the Commission in making its recommendations.

"(5) The Comptroller General of the United States shall—

"(A) assist the Commission, to the extent requested, in the Commission's review and analysis of the recommendations made by the Secretary pursuant to subsection (c); and

"(B) by no later than April 15 of each year in which the Secretary makes such recommendations, transmit to the Congress and to the Commission a report containing a detailed analysis of the Secretary's recommendations and selection process.

"(e) REVIEW BY THE PRESIDENT.—(1) The President shall, by no later than July 15 of each year in which the Commission makes recommendations under subsection (d), transmit to the Commission and to the Congress a report containing the President's approval or disapproval of the Commission's recommendations.

"(2) If the President approves all the recommendations of the Commission, the President shall transmit a copy of such recommendations to the Congress, together with a certification of such approval.

"(3) If the President disapproves the recommendations of the Commission, in whole or in part, the President shall transmit to the Commission and the Congress the reasons for that disapproval. The Commission shall then transmit to the President, by no later than August 15 of the year concerned, a revised list of recommendations for the closure and realignment of military installations.

"(4) If the President approves all of the revised recommendations of the Commission transmitted to the President under paragraph (3), the President shall transmit a copy of such revised recommendations to the Congress, together with a certification of such approval.

"(5) If the President does not transmit to the Congress an approval and certification described in paragraph (2) or (4) by September 1 of any year in which the Commission has transmitted recommendations to the President under this part, the process by which military installations may be selected for closure or realignment under this part with respect to that year shall be terminated.

"SEC. 2904. CLOSURE AND REALIGNMENT OF MILITARY INSTALLATIONS

"(a) IN GENERAL.—Subject to subsection (b), the Secretary shall—

"(1) close all military installations recommended for closure by the Commission in each report transmitted to the Congress by the President pursuant to section 2903(e);

"(2) realign all military installations recommended for realignment by such Commission in each such report;

"(3) initiate all such closures and realignments no later than two years after the date on which the President transmits a report to the Congress pursuant to section 2903(e) containing the recommendations for such closures or realignments; and

"(4) complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignment.

"(b) CONGRESSIONAL DISAPPROVAL.—(1) The Secretary may not carry out any closure or realignment recommended by the Commission in a report transmitted from the President pursuant to section 2903(e) if a joint resolution is enacted, in accordance with the provisions of section 2908, disapproving such recommendations of the Commission before the earlier of—

"(A) the end of the 45-day period beginning on the date on which the President transmits such report; or

"(B) the adjournment of Congress sine die for the session during which such report is transmitted.

"(2) For purposes of paragraph (1) of this subsection and subsections (a) and (c) of section 2908, the days on which either House of Congress is not in session because of an adjournment of more than three days to a day certain shall be excluded in the computation of a period.

"SEC. 2905. IMPLEMENTATION

"(a) IN GENERAL.—(1) In closing or realigning any military installation under this part, the Secretary may—

"(A) take such actions as may be necessary to close or realign any military installation, including the acquisition of such land, the construction of such replacement facilities, the performance of such activities, and the conduct of such advance planning and design as may be required to transfer functions from a military installation being closed or realigned to another military installation, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for use in planning and design, minor construction, or operation and maintenance;

"(B) provide—

"(i) economic adjustment assistance to any community located near a military installation being closed or realigned, and

"(ii) community planning assistance to any community located near a military in-

stallation to which functions will be transferred as a result of the closure or realignment of a military installation,

if the Secretary of Defense determines that the financial resources available to the community (by grant or otherwise) for such purposes are inadequate, and may use for such purposes funds in the Account or funds appropriated to the Department of Defense for economic adjustment assistance or community planning assistance;

"(C) carry out activities for the purposes of environmental restoration and mitigation at any such installation, and shall use for such purposes funds in the Account;

"(D) provide outplacement assistance to civilian employees employed by the Department of Defense at military installations being closed or realigned, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense for outplacement assistance to employees; and

"(E) reimburse other Federal agencies for actions performed at the request of the Secretary with respect to any such closure or realignment, and may use for such purpose funds in the Account or funds appropriated to the Department of Defense and available for such purpose.

"(2) In carrying out any closure or realignment under this part, the Secretary shall ensure that environmental restoration of any property made excess to the needs of the Department of Defense as a result of such closure or realignment be carried out as soon as possible with funds available for such purpose.

"(b) MANAGEMENT AND DISPOSAL OF PROPERTY.—(1) The Administrator of General Services shall delegate to the Secretary of Defense, with respect to excess and surplus real property and facilities located at a military installation closed or realigned under this part—

"(A) the authority of the Administrator to utilize excess property under section 202 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483);

"(B) the authority of the Administrator to dispose of surplus property under section 203 of that Act (40 U.S.C. 484);

"(C) the authority of the Administrator to grant approvals and make determinations under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)); and

"(D) the authority of the Administrator to determine the availability of excess or surplus real property for wildlife conservation purposes in accordance with the Act of May 19, 1948 (16 U.S.C. 667b).

"(2)(A) Subject to subparagraph (C), the Secretary of Defense shall exercise the authority delegated to the Secretary pursuant to paragraph (1) in accordance with—

"(i) all regulations in effect on the date of the enactment of this Act [Nov. 5, 1990] governing the utilization of excess property and the disposal of surplus property under the Federal Property and Administrative Services Act of 1949 [40 U.S.C. 471 et seq.]; and

"(ii) all regulations in effect on the date of this Act governing the conveyance and disposal

of property under section 13(g) of the Surplus Property Act of 1944 (50 U.S.C. App. 1622(g)).

"(B) The Secretary, after consulting with the Administrator of General Services, may issue regulations that are necessary to carry out the delegation of authority required by paragraph (1).

"(C) The authority required to be delegated by paragraph (1) to the Secretary by the Administrator of General Services shall not include the authority to prescribe general policies and methods for utilizing excess property and disposing of surplus property.

"(D) The Secretary of Defense may transfer real property or facilities located at a military installation to be closed or realigned under this part with or without reimbursement, to a military department or other entity (including a nonappropriated fund instrumentality) within the Department of Defense or the Coast Guard.

"(E) Before any action may be taken with respect to the disposal at any military installation to be closed or realigned under this part, the Secretary of Defense shall consult with the Governor of the State and the heads of the local government concerned for the purpose of considering any plan for the use of such property by the local community concerned.

"(c) APPLICABILITY OF NATIONAL ENVIRONMENTAL POLICY ACT OF 1969.—(1) The provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) shall not apply to the actions of the President, the Commission, and, except as provided in paragraph (2), the Department of Defense in carrying out this part.

"(2)(A) The provisions of the National Environmental Policy Act of 1969 shall apply to actions of

the Department of Defense under this part (i) during the process of property disposal, and (ii) during the process of relocating functions from a military installation being closed or realigned to another military installation after the receiving installation has been selected but before the functions are relocated.

"(B) In applying the provisions of the National Environmental Policy Act of 1969 to the processes referred to in subparagraph (A), the Secretary of Defense and the Secretary of the military departments concerned shall not have to consider—

"(i) the need for closing or realigning the military installation which has been recommended for closure or realignment by the Commission;

"(ii) the need for transferring functions to any military installation which has been selected as the receiving installation; or

"(iii) military installations alternative to those recommended or selected.

"(3) A civil action for judicial review, with respect to any requirement of the National Environmental Policy Act of 1969 to the extent such Act is applicable under paragraph (2), of any act or failure to act by the Department of Defense during the closing, realigning, or relocating of functions referred to in clauses (i) and (ii) of paragraph (2)(A), may not be brought more than 60 days after the date of such act or failure to act.

"(d) WAIVER.—The Secretary of Defense may close or realign military installations under this part without regard to—

"(1) any provision of law restricting the use of funds for closing or realigning military in-

stallations included in any appropriations or authorization Act; and

"(2) sections 2662 and 2687 of title 10, United States Code.

"SEC. 2906. ACCOUNT

"(a) IN GENERAL.—(1) There is hereby established on the books of the Treasury an account to be known as the 'Department of Defense Base Closure Account 1990' which shall be administered by the Secretary as a single account.

"(2) There shall be deposited into the Account—

"(A) funds authorized for and appropriated to the Account;

"(B) any funds that the Secretary may, subject to approval in an appropriation Act, transfer to the Account from funds appropriated to the Department of Defense for any purpose, except that such funds may be transferred only after the date on which the Secretary transmits written notice of, and justification for, such transfer to the congressional defense committees; and

"(C) except as provided in subsection (d) proceeds received from the transfer or disposal of any property at a military installation closed or realigned under this part.

"(b) USE OF FUNDS.—(1) The Secretary may use the funds in the Account only for the purposes described in section 2905(a).

"(2) When a decision is made to use funds in the Account to carry out a construction project under section 2905(a) and the cost of the project will exceed the maximum amount authorized by law for a

minor military construction project, the Secretary shall notify in writing the congressional defense committees of the nature of, and justification for, the project and the amount of expenditures for such project. Any such construction project may be carried out without regard to section 2802(a) of title 10, United States Code.

"(c) REPORTS.—(1) No later than 60 days after the end of each fiscal year in which the Secretary carries out activities under this part, the Secretary shall transmit a report to the congressional defense committees of the amount and nature of the deposits into, and the expenditures from, the Account during such fiscal year and of the amount and nature of other expenditures made pursuant to section 2905(a) during such fiscal year.

"(2) Unobligated funds which remain in the Account after the termination of the Commission shall be held in the Account until transferred by law after the congressional defense committees receive the report transmitted under paragraph (3).

"(3) No later than 60 days after the termination of the Commission, the Secretary shall transmit to the congressional defense committees a report containing an accounting of—

"(A) all the funds deposited into and expended from the Account or otherwise expended under this part; and

"(B) any amount remaining in the Account.

"(d) DISPOSAL OR TRANSFER OF COMMISSARY STORES AND PROPERTY PURCHASED WITH NONAPPROPRIATED FUNDS.—(1) If any real property or facility acquired, constructed, or improved (in whole or in part) with commissary store funds or nonappropri-

ated funds is transferred or disposed of in connection with the closure or realignment of a military installation under this part, a portion of the proceeds of the transfer or other disposal of property on that installation shall be deposited in the reserve account established under section 204(b)(4)(C) of the Defense Authorization Amendments and Base Closure and Realignment Act [Pub. L. 100-526] (10 U.S.C. 2687 note).

"(2) The amount so deposited shall be equal to the depreciated value of the investment made with such funds in the acquisition, construction, or improvement of that particular real property or facility. The depreciated value of the investment shall be computed in accordance with regulations prescribed by the Secretary of Defense.

"(3) The Secretary may use amounts in the account (in such an aggregate amount as is provided in advance in appropriation Acts) for the purpose of acquiring, constructing, and improving—

"(A) commissary stores; and

"(B) real property and facilities for nonappropriated fund instrumentalities.

"(4) As used in this subsection:

"(A) The term 'commissary store funds' means funds received from the adjustment of, or surcharge on, selling prices at commissary stores fixed under section 2685 of title 10, United States Code.

"(B) The term 'nonappropriated funds' means funds received from a nonappropriated fund instrumentality.

"(C) The term 'nonappropriated fund instrumentality' means an instrumentality of the United States under the jurisdiction of the Armed Forces (including the Army and Air Force Exchange Service, the Navy Resale and Services Support Office, and the Marine Corps exchanges) which is conducted for the comfort, pleasure, contentment, or physical or mental improvement of members of the Armed Forces.

"(e) ACCOUNT EXCLUSIVE SOURCE OF FUNDS FOR ENVIRONMENTAL RESTORATION PROJECTS.—Except for funds deposited into the Account under subsection (a), funds appropriated to the Department of Defense may not be used for purposes described in section 2905(a)(1)(C). The prohibition in this subsection shall expire upon the termination of the authority of the Secretary to carry out a closure or realignment under this part.

"SEC. 2907. REPORTS

"As part of the budget request for fiscal year 1993 and for each fiscal year thereafter for the Department of Defense, the Secretary shall transmit to the congressional defense committees of Congress—

"(1) a schedule of the closure and realignment actions to be carried out under this part in the fiscal year for which the request is made and an estimate of the total expenditures required and cost savings to be achieved by each such closure and realignment and of the time period in which these savings are to be achieved in each case, together with the Secretary's assessment of the environmental effects of such actions; and

"(2) a description of the military installations, including those under construction and

those planned for construction, to which functions are to be transferred as a result of such closures and realignments, together with the Secretary's assessment of the environmental effects of such transfers.

"SEC. 2908. CONGRESSIONAL CONSIDERATION OF COMMISSION REPORT

"(a) TERMS OF THE RESOLUTION.—For purposes of section 2904(b), the term 'joint resolution' means only a joint resolution which is introduced within the 10-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), and—

"(1) which does not have a preamble;

"(2) the matter after the resolving clause of which is as follows: 'That Congress disapproves the recommendations of the Defense Base Closure and Realignment Commission as submitted by the President on ———', the blank space being filled in with the appropriate date; and

"(3) the title of which is as follows: 'Joint resolution disapproving the recommendations of the Defense Base Closure and Realignment Commission.'.

"(b) REFERRAL.—A resolution described in subsection (a) that is introduced in the House of Representatives shall be referred to the Committee on Armed Services of the House of Representatives. A resolution described in subsection (a) introduced in the Senate shall be referred to the Committee on Armed Services of the Senate.

"(c) DISCHARGE.—If the committee to which a resolution described in subsection (a) is referred has

not reported such resolution (or an identical resolution) by the end of the 20-day period beginning on the date on which the President transmits the report to the Congress under section 2903(e), such committee shall be, at the end of such period, discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the House involved.

"(d) CONSIDERATION.—(1) On or after the third day after the date on which the committee to which such a resolution is referred has reported, or has been discharged (under subsection (c)) from further consideration of, such a resolution, it is in order (even though a previous motion to the same effect has been disagreed to) for any Member of the respective House to move to proceed to the consideration of the resolution. A Member may make the motion only on the day after the calendar day on which the Member announces to the House concerned the Member's intention to make the motion, except that, in the case of the House of Representatives, the motion may be made without such prior announcement if the motion is made by direction of the committee to which the resolution was referred. All points of order against the resolution (and against consideration of the resolution) are waived. The motion is highly privileged in the House of Representatives and is privileged in the Senate and is not debatable. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the resolution is agreed to, the respective House shall immediately proceed to consideration of the joint reso-

lution without intervening motion, order, or other business, and the resolution shall remain the unfinished business of the respective House until disposed of.

"(2) Debate on the resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 2 hours, which shall be divided equally between those favoring and those opposing the resolution. An amendment to the resolution is not in order. A motion further to limit debate is in order and not debatable. A motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the resolution is not in order. A motion to reconsider the vote by which the resolution is agreed to or disagreed to is not in order.

"(3) Immediately following the conclusion of the debate on a resolution described in subsection (a) and a single quorum call at the conclusion of the debate if requested in accordance with the rules of the appropriate House, the vote on final passage of the resolution shall occur.

"(4) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution described in subsection (a) shall be decided without debate.

"(e) CONSIDERATION BY OTHER HOUSE.—(1) If, before the passage by one House of a resolution of that House described in subsection (a), that House receives from the other House a resolution described in subsection (a), then the following procedures shall apply:

"(A) The resolution of the other House shall not be referred to a committee and may not be

considered in the House receiving it except in the case of final passage as provided in subparagraph (B)(ii).

"(B) With respect to a resolution described in subsection (a) of the House receiving the resolution—

"(i) the procedure in that House shall be the same as if no resolution had been received from the other House; but

"(ii) the vote on final passage shall be on the resolution of the other House.

"(2) Upon disposition of the resolution received from the other House, it shall no longer be in order to consider the resolution that originated in the receiving House.

"(f) RULES OF THE SENATE AND HOUSE.—This section is enacted by Congress—

"(1) as an exercise of the rulemaking power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of a resolution described in subsection (a), and it supersedes other rules only to the extent that it is inconsistent with such rules; and

"(2) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

"SEC. 2909. RESTRICTION ON OTHER BASE CLOSURE AUTHORITY

"(a) IN GENERAL.—Except as provided in subsection (c), during the period beginning on the date of the enactment of this Act [Nov. 5, 1990] and ending on December 31, 1995, this part shall be the exclusive authority for selecting for closure or realignment, or for carrying out any closure or realignment of, a military installation inside the United States.

"(b) RESTRICTION.—Except as provided in subsection (c), none of the funds available to the Department of Defense may be used, other than under this part, during the period specified in subsection (a)—

"(1) to identify, through any transmittal to the Congress or through any other public announcement or notification, any military installation inside the United States as an installation to be closed or realigned or as an installation under consideration for closure or realignment; or

"(2) to carry out any closure or realignment of a military installation inside the United States.

"(c) EXCEPTION.—Nothing in this part affects the authority of the Secretary to carry out—

"(1) closures and realignments under title II of Public Law 100-526 [set out below]; and

"(2) closures and realignments to which section 2687 of title 10, United States Code, is not applicable, including closures and realignments carried out for reasons of national security or a military emergency referred to in subsection (c) of such section.

"SEC. 2910. DEFINITIONS

"As used in this part:

"(1) The term 'Account' means the Department of Defense Base Closure Account 1990 established by section 2906(a)(1).

"(2) The term 'congressional defense committees' means the Committees on Armed Services and the Committees on Appropriations of the Senate and of the House of Representatives.

"(3) The term 'Commission' means the Commission established by section 2902.

"(4) The term 'military installation' means a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. Such term does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense.

"(5) The term 'realignment' includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personel or funding levels, or skill imbalances.

"(6) The term 'Secretary' means the Secretary of Defense.

"(7) The term 'United States' means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and any other commonwealth, territory, or possession of the United States.

"SEC. 2911. CLARIFYING AMENDMENT

"[Amended this section.]"

[For effective date of amendments by section 344 (b)(1) of Pub. L. 102-190 to section 2906 of Pub. L. 101-510, set out above, see Effective Date of 1991 Amendments by Section 344 of Pub. L. 102-190 note set out above.]

[Section 2821(h)(2) of Pub. L. 102-190 provided that: "The amendment made by paragraph (1) [amending section 2910 of Pub. L. 101-510 set out above] shall take effect as of November 5, 1990, and shall apply as if it had been included in section 2910 (4) of the Defense Base Closure and Realignment Act of 1990 [section 2910 of Pub. L. 101-510] on that date."]

[Section 2827(a)(3) of Pub. L. 102-190 provided that: "The amendments made by this subsection [amending sections 2905 and 2906 of Pub. L. 101-510 set out above] shall take effect on the date of the enactment of this Act [Dec. 5, 1991]."]

[References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.]

APPENDIX H

The Administrative Procedure Act,
5 U.S.C. 551-559 & 701-706

Sec. 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2

of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

Sec. 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60327